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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 525

MATSON NAVIGATION COMPANY,
Petitioner,

vs.

C. R. SMITH (Successor), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY and SAN DIEGO UNIFIED PORT DISTRICT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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C. R. SMITH (Successor), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY and SAN DIEGO UNIFIED PORT DISTRICT,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Matson Navigation Company, appellant below, petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit entered in this case May 17, 1968.

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (App. A, *infra*, p. 1) is reported at 394 F.2d 514. The memorandum opinion and order of the district court (App. B, *infra*, p. 3) is reported at 258 F.Supp. 144. The opinion and order of the Secretary of Commerce (App.C, *infra*, p. 28) is reported at Pike & Fischer, Shipping Regulation Reports, 5 SRR 1111.

JURISDICTION

The judgment of the court of appeals was entered May 17, 1968 (App.A, p. 2). Petition for rehearing was denied June 21, 1968 (App.A, p. 2). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

A steamship operator of freight vessels built with the aid of construction-differential subsidy and employed with the aid of operating-differential subsidy, pursuant to Titles V and VI of the Merchant Marine Act, 1936, as amended, in foreign commerce between the United States West Coast and the Far East, applied for permission under Section 805(a) of that Act to operate these vessels in California-Hawaii domestic commerce in the course of their trans-Pacific voyages. The questions are:

1. Whether the Secretary of Commerce may grant permission for the employment of subsidized vessels in domestic commerce, in competition with the operator of an exclusively domestic, unsubsidized service, without making a determination of the amount of subsidy support to be channelled in consequence into the domestic service, or without adopting any formula or accounting method for ascertaining the magnitude of such subsidy support.

2. Whether, in considering an application for permission to use subsidized vessels in domestic commerce in the course of their foreign voyages, the Secretary of Commerce, for purposes of ascertaining the extent to which the transportation of domestic cargo may be supported by subsidy, is required to test the financial results of the domestic service on a basis of fully distributed costs and, to the extent that this accounting basis leaves discretion in the appraisal of cost items, to explain the basis for the results reached. If

the Secretary of Commerce does not apply the test of fully distributed costs, whether he is not required to apply some accounting method and explain the reasons for his selection of it.

3. Whether, consistent with Section 805(a), subsidy benefits diverted to the support of the transportation of domestic cargo can be balanced, and so eliminated from consideration, by "equalizing forces", such as unspecified aid to domestic operators and statutory and contractual restrictions upon subsidized operators; and, particularly, whether such balancing can be conducted when the amount of subsidy support—the counter to be placed on one side of the scales—is undetermined.

4. Whether the important public purposes declared in the Merchant Marine Act, 1936, as amended, do not require this Court to exercise its supervisory powers in order to correct the inconsistent and chaotic administration of Section 805(a) which has obtained in recent years.

STATUTE INVOLVED

The order of the Secretary of Commerce under review was issued pursuant to Section 805(a) of the Merchant Marine Act, 1936, as amended, 49 Stat. 2012, as amended, 46 U.S.C. § 1223(a). The text of Section 805(a) is set forth at Appendix D, *infra*, p. 86.

STATEMENT

A. Section 805(a) and the Steamship Companies Involved in This Case.

Section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), requires any contractor, such as States Steamship Company (States), receiving operating-differential subsidy (ODS), to file an application and to receive written permission from the Secretary of Commerce (the

Secretary) before operating any vessel in domestic commerce. The Secretary is required to permit every person having "any interest" in such application to intervene and be heard. Permission must be denied if the proposed domestic service would result in "unfair competition" to any person operating exclusively in domestic service or would be "prejudicial to the objects and policy" of the Act. The concluding paragraph of Section 805(a) makes it unlawful for a subsidized operator "to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States", into any domestic operation.

States presently receives ODS for the operation of freight vessels between the United States West Coast and the Far East (App.C, p. 28; SC 9, p. 6; STr. 39, 2731).[1] In 1953 States' predecessor in interest, Pacific Transport Lines, Inc. (PTL), received without objection permission, pursuant to Section 805(a), to make 13 eastbound and 13 westbound calls at Hawaii annually in domestic commerce with vessels in its West Coast-Far East service. *Pacific Transport Lines, Inc.-Subsidy Route 29,* 4 F.M.B. 7 (1952). Subsequent to the merger of PTL into States in 1957 and the execution of States' ODS contract, States entered into a construction-differential subsidy (CDS) contract with the United States for the construction of six new Mariner type

1. References in this petition to the record will be designated as follows: (1) the record made before the district court and paginated by the clerk of the district court in his certificate of October 5, 1966, as supplemented, to the court below, "R." followed by the clerk's page number; (2) the transcript of oral testimony within the Department of Commerce, "STr." followed by pages indicated in the Secretary's certification of record, dated January 14, 1966 (R.295-319); and (3) all other documents certified to the district court, "S" followed by the same letter and number designation and appropriate page number (*e.g.* "SD1, p. 1") as used in the Secretary's certification of record (R.295-319).

vessels to replace its older, slower and smaller, World War II-built vessels then engaged in the West Coast-Far East service; and the new vessels were subsequently constructed (STr. 220-23, 228-35).

By letter dated January 30, 1961, States applied, pursuant to Section 805(a), for permission to increase the number of its eastbound and westbound calls with its trans-Pacific, subsidized vessels at Honolulu in domestic commerce from 13 to 26 in each direction annually (SA1). It is only the second 13 voyages in each direction that are in issue here (although Matson maintains that all 26 must be taken into account in appraising subsidy support).

States' application thus contemplated the operation in California-Hawaii domestic trade on 26 voyages annually of six new Mariner vessels, approximately 48% of whose construction cost and approximately 65% of whose operating cost were and are borne by the federal government (STr. 406-07, 2248, 3186-87; SC12, Item 10 Revised, p. 3). Over the 25-year life of each vessel, such subsidy would amount to some $17,000,000 in ODS and $6,000,000 in CDS, a total of $23,000,000 per vessel, or $122,000,000 for the vessels here involved.[2] More precisely, with respect to the 26 voyages, States receives annually $1,255,800 as Government aid in the form of CDS and $3,582,000 in the form of ODS. As a result of its carriage of California-Hawaii cargo, States must, pursuant to Sections 506 and 605(a) of the Act (46 U.S.C. §§ 1156, 1175(a), refund a portion of the

2. States contemplates that its 26 voyages in California-Hawaii-Far East service will require the full time of five of its new Mariners but only approximately 30% of the time of the sixth Mariner. Hence, the total figures above are computed on the basis of 5.3 Mariners which States estimated it would devote annually to this trade.

CDS and suffer a reduction in ODS, but it still receives subsidy, on an annual basis with respect to the 26 voyages (and apart from its other subsidized voyages), of $3,658,800. (SC12, Item 10, Revised, p. 3.) In addition, States and other subsidized operators enjoy substantial tax advantages not available to unsubsidized operators (46 U.S.C. § 1177(h)).

Matson for over 85 years has provided a complete, all-purpose, non-subsidized cargo service operating exclusively between the West Coast and Hawaii. Matson has paid from its own tax paid funds every penny of the cost of its vessels, specially designed to meet the needs of the Hawaii trade, and of its modern container equipment (a field of operation in which Matson has been an acknowledged pioneer). (SC87, SC88; STr. 3979-81, 4008-14, 5516-21, 5491, 6120-21.) Neither CDS nor ODS, nor the special tax advantages above mentioned, are available to the operator of an exclusively domestic service, such as that operated by Matson. Foreign flag vessels are, of course, barred from the domestic trade. At the same time, any non-subsidized United States flag vessel is free to enter the domestic trade without any governmental permission.[3]

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3. Pursuant to the "grandfather rights" proviso of Section 805(a), Matson, having owned all of the stock of The Oceanic Steamship Company for several years prior to the specified year of 1935, was permitted to continue to hold that stock despite the fact that Oceanic is a small subsidized carrier in the West Coast-New Zealand-Australia service. The Secretary's decision adverted to the Matson-Oceanic relationship in the course of determining, in accordance with the precedents, that Matson in its West Coast-Hawaii service was an exclusively domestic operator entitled to the protection of Section 805(a) against "unfair competition" (App. C, pp. 46-51).

It may also be noted that Matson has recently established a separate foreign, *unsubsidized* trans-Pacific service.

B. The Proceedings.

States' application for the additional 13 voyages in each direction annually, as referred to above, was heard before a Hearing Examiner of the Maritime Subsidy Board (Board).[4] Matson, as an intervenor, contended that the crucial question under Section 805(a) is whether the proposed domestic operation of a subsidized operator will be significantly dependent upon subsidy (including the associated tax benefits available only to a subsidized operator). If so, Matson argued, that is the very evil Section 805(a) is intended to prevent. Further, the acid test of the existence and extent of subsidy support is the profitability of the domestic service on a fully distributed cost (sometimes referred to as fully allocated or full absorption cost) basis. Since, as Matson maintained, the evidence, on States' own revenue and cost estimates, established that the domestic revenues would fail to cover the fully distributed cost of providing the domestic service in the range of $1,000,000 annually (App.F, *infra,* p. 94), the substantial degree to which the domestic service would be dependent upon subsidy was manifest. In Matson's view, these facts required

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4. At the time States' application was filed, the power to grant Section 805(a) permission was vested in the Federal Maritime Board; however, such power was transferred by Congress to the Secretary of Commerce by the provisions of Section 202(b) (1) of Reorganization Plan No. 7 of 1961, 75 Stat. 840, and the Secretary was authorized to delegate such power by the provisions of Section 203 thereof. By Department of Commerce Order 117 (Revised), 27 Fed. Reg. 7687 (subsequently superseded by Department Order 117-A, 31 Fed. Reg. 8087, 15331), the Secretary created the Maritime Subsidy Board within the Department of Commerce and delegated his powers under Section 805(a) to the Board, subject to his power to review and set aside all orders of the Board.

denial of the application, although many additional facts supported the same result.[5]

States urged that no Section 805(a) permission was required for it to call at Hawaii with subsidized vessels, because of the requirement in Sections 506 and 605(a) that a portion of its subsidy be refunded and reduced in connection with such calls. Alternatively, States contended that Section 805(a) permission, if required, must be granted as a matter of law in the light of the subsidy refunds and reductions pursuant to Sections 506 and 605(a). Both of these contentions were rejected by the Secretary and were not in issue before the courts below (App. C, pp. 32-33, 52-53; R. 96-97). In addition, States also contended that its domestic service would not be subsidy-supported, because it was shown to be profitable on an incremental cost basis, and that its application should be granted whether or not supported by subsidy.

In the present context, the application of fully distributed cost vis-a-vis incremental cost accounting is readily illustrated. On their way to and from the Far East, States' subsidized vessels are 2400 miles out in the Pacific, within one or two days steaming time of Honolulu. The incremental approach maintains that the domestic cargo, to or from Hawaii, represents an added-on service, and need bear none of the sizable general or fixed vessel and company costs in placing the vessel, including its carriage of domestic cargo,

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5. The domestic service loss is, and must be, made up from the concurrent foreign operations that are a part of the same 26 voyages. But the 26 voyages, foreign and domestic, operate at a loss without subsidy, which, after all refunds and reductions, amounts to the $3,658,000 previously referred to (*supra*, p. 6). It mathematically follows, so Matson has always contended, that the domestic operation is supported by subsidy to the extent, in round figures, of $1,000,000 annually. This support is without regard to the associated tax benefits available to States as a subsidized operator.

2400 miles off the West Coast. The fully distributed cost method, on the other hand, requires an allocation of such general or fixed costs as between domestic and foreign cargo on a gross revenue, revenue ton-mile, or other appropriate basis, calculated to assure that each class of cargo pays its fair share of the transportation. Having in mind that the purpose under Section 805(a) is to determine the extent, if any, by which the cost of transporting the foreign cargo is diverted to the carriage of the domestic cargo, the incremental approach, it will be seen, assumes that such diversion may occur. Matson has always maintained that States, in its own interest for purposes of applying Section 805(a), should disavow the incremental approach. (*E.g.*, SA64, p.5; App. C, pp. 65-66)

The State of Hawaii and Public Counsel, who is an officer of the Maritime Administration employed to protect solely the public interest, participated at all stages of the proceedings before the Examiner, and took no position until all of the evidence was in. Both then supported Matson in opposing States' application, and, among many other considerations, fully endorsed the need for determining the extent of States' subsidy benefits in the domestic trade on the basis of the fully distributed cost of providing the domestic service, or full absorption accounting. (SA52, SA55.)[6]

The Hearing Examiner, with some 30 years experience in Maritime cases, heard every witness and ruled on every exhibit. His recommended decision (SA64) made extensive findings of fact. Among other things, he adopted full absorption accounting as the proper basis for determining the

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6. Public Counsel is not authorized to participate as an advocate after the Board has rendered its decision. The State of Hawaii did not participate in the proceedings before the courts below, except by way of filing a statement of position (R. 723-26), which reaffirmed Hawaii's opposition to the granting of States' additional permission here involved.

degree of subsidy support to States' domestic service and found that such support would amount to approximately $1,000,000 annually. Applying precedents under the Act, he therefore recommended denial of States' application on each of the independent grounds, under Section 805(a), of unfair competition to Matson and prejudice to the objects and policy of the Act.[7]

The Maritime Subsidy Board, reviewing the recommended decision, reversed the Examiner's decision and held for States (SA80). In most important respects, the Board adopted the findings of fact of its Hearing Examiner, including his determination that subsidy support existed, as shown on the basis of fully distributed costs. Nevertheless, the Board fashioned and applied a new test which held that States' application could not be denied unless it was found that subsidy would give States an "overwhelming, unconscionable advantage" over Matson to such a degree that Matson could no longer compete effectively for available cargo (SA80, p. 18). The reasoning of the Board's decision was disavowed, at least in terms, by the decision of the Secretary here under review.[8]

Matson and the State of Hawaii, pursuant to Department of Commerce Order 117 (Rev.), promptly filed petitions requesting then Secretary Hodges to review the order of the

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7. The Hearing Examiner did recommend that States be permitted to increase its calls in San Diego commerce from 13 to 26 and that it be permitted to make such additional calls in California-Hawaii commerce as might be required to lift any cargo which Matson could not carry on two weeks' notice (SA64). Matson did not oppose the portion of States' application relating to San Diego-Hawaii commerce, and, save for the administrative problems created thereby, would not have objected to the two-week provision.

8. The Board's final opinion and order were issued and served on November 27, 1963, some 27 days after the Board's then former Chairman, who purportedly participated in such final opinion and order, had left the Government service to return to private business.

Board. These petitions were granted by the Secretary, and the order of the Board was stayed pending his review. On April 23, 1964, the Secretary issued his opinion and order, denying States' application in the main but authorizing States to carry westbound cargo from California to Hawaii on 13 additional voyages a year on condition that right of first refusal upon two weeks' notice be given to Matson and other unsubsidized operators in the trade (SA94; 1 M.A. 37). The principal basis for Secretary Hodges' decision was that granting States' application would be prejudicial to the objects and policy of the Act because "Government subsidy dollars would be used to support the domestic leg of the service" proposed by States and such service would have more than a *de minimis* adverse effect upon the earnings and financial strength of Matson, the principal unsubsidized domestic carrier already serving the trade (SA94, pp. 7-8; 1 M.A. at 40).

Thereafter, States filed suit against Secretary Hodges in the United States District Court for the District of Columbia. However, prior to any decision by that court on the merits, Secretary Hodges, joined by all the parties, requested the court to remand the case to him for the purpose of vacating his decision and for further consideration (SD5, SD8, SD9). Two other cases applying the same legal test employed by Secretary Hodges in the instant case were not vacated and remain in the books as precedents.[9] Soon thereafter, Secretary Hodges retired and Secretary Connor was brought into Government service.

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9. American Export Lines, Inc.—U.S. Atlantic-Puerto Rico Service, 1 M.A. 285 (1964); Grace Lines, Inc.—Application to Call at Puerto Rico, 1 M.A. 284 (1964). Secretary Hodges' opinion and order in the present case is reported at 1 M.A. 37 (1964).

The case was then re-reviewed by a stranger to the proceeding denominated a Review Examiner, who adopted a line of reasoning also disavowed by the new Secretary in the instant decision. Secretary Connor thereafter, on July 6, 1965, issued the decision now under review (App. C, p. 28), granting States' application for the additional 13 voyages in California-Hawaii domestic service. As had the Board, the Secretary accepted most of the Hearing Examiner's findings of fact, but fashioned a new test of "substantial competitive advantage" for the application of Section 805(a), quite inconsistent with the test employed by Secretary Hodges in the two extant decisions referred to as well as with the great body of administrative precedents.

Matson invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1337, 2201 and 2202, and 5 U.S.C. §§ 702, 706; and under its general jurisdiction to review orders of federal officials (*Stark v. Wickard*, 321 U.S. 288 (1944); *Pacific Far East Line, Inc. v. FMB*, 275 F.2d 184 (D.C. Cir. 1960), certiorari denied 363 U.S. 827). The district court's memorandum opinion and order (App. B, p. 3), affirming the Secretary's opinion and order of July 6, 1965 was affirmed by the court of appeals' *per curiam decision* (App. A, p. 1). Matson's timely petition for rehearing with suggestion of rehearing *en banc* was denied by the three-judge panel which had heard the case on June 21, 1968 (App. A, p. 2).[10] There has been no stay of the Secretary's order granting permission for the additional 13 voyages (a total of 26 in each direction annually) in domestic commerce.

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10. The Rules of the United States Court of Appeals for the Ninth Circuit, effective prior to July 1, 1968, relating to hearings and rehearings *en banc* (Rule 23, last paragraph), departed significantly from the current Federal Rules of Appellate Procedure (Rule 35).

REASONS FOR GRANTING THE WRIT

Analysis of the Secretary's decision in the light of the terms and legislative history of Section 805(a) and other judicial and administrative decisions establishes, we submit, within the sense of Rule 19, the advisability of granting certiorari to review the decision below. The court below, affirming the district court and thereby the Secretary's decision, has decided an important question of federal law which has not been, but should be, settled by this Court; the decision below conflicts, in principle, with two other decisions of courts of appeals, and conflicts with prior administrative decisions; and in certain aspects it has decided, by affirming the district court and thereby the Secretary's decision, important federal questions in a way in conflict with applicable decisions of this Court.

I

THE SECRETARY'S DECISION, AS AFFIRMED BY THE COURTS BELOW; THE TERMS AND LEGISLATIVE HISTORY OF SECTION 805(a); AND PRIOR ADMINISTRATIVE DECISIONS; THE TWO OTHER COURT OF APPEALS DECISIONS CONSTRUING SECTION 805(a).

A. The Secretary's Decision, as Affirmed by the Courts Below.

The Secretary's decision, although fortified by a tone of reasonableness, minimizes the element of subsidy support (and associated tax advantages) flowing from the foreign service into the domestic service to an extent wholly impermissible in the light of the terms and the legislative history of Section 805(a). The decision acknowledges, as it obviously must, that the carriage of domestic cargo "would be benefited *to some extent* because of subsidy" (App. C, p. 60; emphasis ours). But the decision declines even to estimate the amount of the "some extent". The decision further acknowledges that the Mariner vessels to be used by States are "newer and faster than Matson's, would not have been

built without CDS and would not be operated by States without ODS". Further, the decision recognizes, after subsidy rebates and refunds, the facts are not erased "that these vessels are in existence and are in trans-Pacific service on Trade Route 29 passing by Hawaii *and that subsidy helped build them and put them there*" (App. C, pp. 60-61; emphasis ours).

The decision finds (as Matson agrees) that the proposed domestic operation "would be profitable on an incremental accounting basis", but accepts the conclusion of both the Hearing Examiner and the Maritime Subsidy Board (as Matson also agrees) that the operation "would be unprofitable on a full absorption basis" (App. C, p. 67). The Secretary, nevertheless, refuses either to settle upon an accounting method or to recognize the need for any such approach.[11] Instead the Secretary regrets the absence of "an impartial accounting study" in the record and notes that "[p]articularly with regard to the designation of items as fixed costs of doing business by an enterprise, and as to the proportions in which they are properly allocable to different operations, there are several methods of cost allocations, producing a variety of results." (App. C, pp. 66-67.)

The district court agreed "that the Secretary did not come to any exact dollar figure of residual subsidy benefit", although the court thought it unnecessary for him to do so: "Faced with a number of acceptable accounting methods he was free to choose the figure which he considered most

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11. Before the courts below, Matson, *inter alia*, (1) read the Secretary's decision as approving the fully distributed cost approach and accepting the Hearing Examiner's finding of resulting domestic loss, made good by subsidy, in the range of $1,000,000. In the alternative, Matson contended that (2) if the Secretary failed to settle upon an accounting method and to determine the extent of the loss and consequent subsidy support, the case should be remanded to him to supply missing findings. In view of the evident unwillingness of the courts below to interpret the decision as set forth in (1) above, Matson no longer contends that the decision should be so read.

accurate as long as it was a reasonable figure which accorded with modern accounting practice." (App. B, pp. 21-22.) The court went on to say it would have accepted "any of the figures based on full absorption accounting" (App. B, p. 22). What the Secretary thought the test should be or what figure the Secretary used in balancing subsidy against other factors did not concern the court.

Also, the decision astonishingly refuses to recognize the competitive advantage flowing to States due to the tax deferment granted it under Section 607(h) of the Act, 46 U.S.C. § 1177(h). The Secretary does not dispute, for example, the proposition that States may purchase its vessels with earnings upon which no federal taxes have been paid, whereas Matson, like other unsubsidized operators, must purchase its vessels out of tax-paid funds. The Secretary's only response is: "I do not believe that States' following of procedures sanctioned by law in this regard would amount to unfair competition within the meaning of 805(a)" (App. C, p. 64). Of course, the subsidy payments themselves are "sanctioned by law", and this fact presents rather than answers the problem.[12] The district court did not even mention these substantial tax benefits to States.

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12. Some 15 years ago the immense importance of the tax benefit provisions of the Act was recognized in high quarters:

> "Though given little specific emphasis in the enactment of the 1936 act, the tax provisions of that legislation have yielded benefits estimated at $155 million through the end of 1951. This amount is roughly equivalent to the net operating subsidies granted during the same operating period, despite the fact that such operating subsidies were originally intended to be the principal form of maritime aid." (Letter of President Truman to the Speaker of the House of Representatives, January 16, 1953, transmitting studies prepared by the Department of Commerce and the Treasury Department concerning the American Merchant Marine and Federal Tax Policy and Scope and Effect of Tax Benefits Provided the Maritime Industry.)

Although due to the Korean hostilities the corporate tax rates then reached a maximum level of 70% and are somewhat lower today, the significance of such tax benefits remains self-evident. The Revenue Act of 1936 provided a 15% corporate rate.

The Secretary's refusal to confront the magnitude of the subsidy (and tax benefits) diverted from the support of foreign commerce into the domestic operation vitiates his present decision when measured against (A) the purpose and policy of Section 805(a), and (B) the reasoning and analysis of Section 805(a) set forth in the only two decisions of courts of appeal aside from the present case.

We reluctantly submit that the Court is here confronted with a calculated refusal to decide *the* crucial question in the case—the amount, precise or approximate, of the subsidy support to the domestic trade. The endeavor, instead, was to decide the case on the basis of other circumstances, without first forthrightly confronting the factor which Congress considered the most crucial. If such an approach can be countenanced, a mockery is made of the administrative process and of the wholesome national purpose proclaimed in Section 805(a) of the Act.

B. Section 805(a) and Its Legislative History Condemn the Diversion of Subsidy to Support the Transportation of Domestic Cargo.

The Act provides a comprehensive system of construction and operating subsidy benefits, including tax deferral privileges, for American flag operations in foreign commerce (46 U.S.C. §§ 1151-1183, 1177(h)). Such benefits and privileges are logically not extended to domestic operations, from which foreign-flag vessels are excluded. As the district court correctly noted, however: "Another important purpose of the Act was to promote the maintenance of an unsubsidized, privately owned merchant fleet sufficient to carry the nation's 'domestic waterborne commerce' " (App. B, p. 12). Section 805(a) of the Act was intended primarily to further the latter objective. Subsidy and tax support had their place in the battle against foreign-flag competition;

they had no place in the domestic service as against unsubsidized, American flag operations.

The Act was passed in 1936 against a long background of the misuse of subsidy monies paid to support American flag operations in foreign commerce. These abuses, which included the syphoning of subsidy funds into the domestic trade, were disclosed in two separate investigations; one conducted by Postmaster General Farley and the other by a special Senate Committee under the chairmanship of Senator Black.

According to the Farley Report, "millions of dollars of mail pay has been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade, resulting in *unfair competition* with nonsubsidized American lines in the same trade." (H.R. Doc. No. 118, 74th Cong., 1st Sess. 11 (1935); emphasis ours.) The report emphatically recommended that:

> "All American operators in . . . [domestic trade] should receive the same treatment. Aid in that particular trade should be given to all or none, and any change in policy or law should carry with it the same kind of protection and benefits to all." (*Id.* at 19.)

The Black Committee Report was, if anything, more emphatic in its condemnation of the diversion of subsidy money into the domestic trade:

> "It surely cannot be contended that Congress ever intended mail contracts to be let on links of intercoastal routes, wherein the competition to be faced by the operator was only from other American interests. This was well known to Government officials administering the Merchant Marine Act of 1928, but despite that knowledge such contracts were let and are being operated today. Thus there is placed in the hands of the favored contractor a murderous economic weapon to be *used against his American competitors* in a trade

wherein vessels of foreign registry *may not engage.*" (Investigation of Air Mail and Ocean Mail Contracts. S. REP. No. 898, 74th Cong. 1st Sess. 14 (1935); emphasis in original.)

The Black Committee recommended, among other things, that "no operating subsidy should be paid to a shipping operator whose business or interests are in the protected coastwise or intercoastal" trades, and that "[n]o subsidy should be paid for the benefit of any operator whose financial or corporate structure . . . permits the diversion of the subsidy into activities other than bona fide American-flag foreign-trade shipping enterprises. . . ." (*Id.* at 42-43.)[13]

Senator Black introduced the amendment that eventually became Section 805(a) (79 CONG. REC. 6499 (1935)). The original amendment provided an absolute prohibition against domestic operations by subsidized operators. It prevented not only unfair competition, but any domestic operations whatever by subsidized operators.

The House Committee on Merchant Marine and Fisheries reported a bill (H.R. 8555) during the first session of the 74th Congress, which the minority members condemned as permitting "continuation of the unsound policy of subsidies to inter-coastal operators . . . thus placing subsidized American lines in *unfair competition* with unsubsidized American lines . . ." (H. R. REP. No. 1277, 74th Cong., 1st Sess. 35 (1935), emphasis ours.) Congressman Wearin, in an effort to obviate the minority objections, proposed the

13. It will be noted that the expressions "intercoastal routes", "coastwise or intercoastal" trades, etc. were used in the above passages, as well as express language barring subsidy in trades where "vessels of foreign registry may not engage", and confining subsidy to "foreign" trade. Section 805(a) uses the expression "domestic intercoastal or coastwise service". Of course, Mainland-Hawaii and Mainland-Puerto Rico fall within these references to domestic commerce, from which foreign-flag vessels are excluded.

addition of the Black Amendment to H.R. 8555. His avowed object in amending the bill was to confine subsidized steamship company activities to "the development of the foreign service which is being subsidized" and to protect others "against *unfair competition* from a steamship company who is receiving financial aid and prestige from the Government" (79 CONG. REC. 8581 (1935); emphasis ours).

In the final version of Section 805(a), the absolute prohibition was replaced by the prohibition in Section 805(a) against granting permission to subsidized operations that would result in "unfair competition" to exclusively domestic operators or be "prejudicial to the objects and policy of the Act". It is clear from the portions of the legislative history above referred to that the use of subsidy in any significant degree by one operator in direct competition with a domestic operator was regarded by the framers of the Act as inherently "unfair competition".[14] At the same time, subsidized

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14. Analogy may be found in other statutes where Congress, on the basis of its legislative inquiries, has itself established the connection between two facts or circumstances. For example, it was contended in the early days of the National Labor Relations Act that the Board lacked jurisdiction unless findings could be made in a particular case that (1) continuance of the unfair labor practices involved would in fact lead to (2) strikes and other obstructions to interstate commerce. The Supreme Court dealt with this matter in *NLRB v. Jones & Laughlin*, 301 U.S. 1, 43 (1937), as follows:

> "The fact that there appears to have been no major disturbance in that industry [the steel industry] in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and to exercise its protective power to forestall."

And see *Virginian Ry. v. Federation*, 300 U.S. 515, 557 (1937). The contention was more nakedly advanced in *NLRB v. Alloy Cast Steel Co.*, 117 F.2d 302 (6th Cir. 1941), where it was argued that the Board lacked jurisdiction because nothing in the record established that the respondent's (1) "refusal to bargain has at any time" (2) "led or tended to lead to labor disputes burdening or obstructing commerce". (117 F.2d at p. 303). The court rejected this contention, quoting the above passage from the *Jones & Laughlin* case, and concluding that Congress itself, on the basis of long experience, had

operators might be permitted to operate in the domestic trade in situations where there were no exclusively domestic services and no prejudice otherwise to the objects and policy of the Act. While the "prejudicial to the objects and policy" of the Act clause is more general and vague than the "unfair competition" clause, prevention of subsidized intrusion into the domestic trade was quite obviously an important policy of the Act.

To make doubly sure subsidy would not be used in the domestic trade, the concluding paragraph of Section 805(a) makes it unlawful for a subsidized operator "to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any" domestic operation. This provision is obviously of great importance. By its terms, the provision cannot be violated unless the requested permission is granted, but it clearly requires the Secretary to deny any Section 805(a) application when the evidence shows (as it does in this case) that such a diversion will occur if the application is granted. Any other construction would impute to Congress the foolish intent that permission may be granted to do that which it has expressly made unlawful.[15]

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determined that the prohibited conduct had a tendency to cause obstructions of interstate commerce.

So, in Section 805(a), where Congress has established the nexus between (1) subsidy paid to support foreign commerce, resulting in (2) presumptive unfairness and prejudice when spilled over to support domestic commerce.

15. The Secretary's decision in applying its test of "substantial competitive advantage" adverted to Matson's "predominant" position in the West Coast-Hawaii trade (App. C, p. 58), but did not read Section 805(a) or the policy of the Act to authorize the diversion of subsidy into the domestic trade in order to combat the predominance of one carrier, or generally to promote competition. We think it true that nothing in the Act authorizes the diversion of subsidy funds from foreign commerce into the domestic trades

Consistent with the clear language of Section 805(a), a long line of decisions has meticulously protected the domestic operator against subsidized competition, holding such to be *prima facie* unfair competiton and prejudicial to the objects and policy of the Act. See, *e.g.*, *American President Lines—Unsubsidized Operation, Route 17*, 3 F.M.B.—M.A. 457, 470 (1951); *American President Lines, Ltd.—Section 805 (a) Application*, 4 F.M.B.—M.A. 436, 440 (1954); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.—M.A. 488, 504 (1954); *T. J. McCarthy Steamship Co.—Sec. 805(a) Application*, 5 F.M.B. 666 (1959); *Waterman S.S. Corp.—Sec. 805(a) Application*, 6 F.M.B. 115 (1960); *American Export Lines, Inc.—U.S. Atlantic-Puerto Rico Service*, 1 M.A. 285 (Sec'y Commerce 1964); *Grace Line, Inc.—Application to Call at Puerto Rico*, 1 M.A. 284 (Sec'y Commerce 1964).

The present Maritime Subsidy Board declared in its first Section 805(a) decision:

> "Section 101 of the Act states as a prime object 'that the United States shall have a merchant marine suffi-

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in order to enforce any policy of the antitrust laws. That is the business of the Department of Justice and, to the more limited extent that antitrust policies are to be observed, of the Federal Maritime Commission, which enforces the Shipping Act, 1916, as amended, 46 U.S.C. §§ 801 *et seq.*, and the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. §§ 843 *et seq.*

Prior to August, 1964, Matson was in large part owned by four important Hawaii agricultural, factoring and shipper interests. By the terms of a consent decree entered by the United States District Court for the District of Hawaii on August 17, 1964, three of these four interests were required to sell their stock in Matson, and the fourth interest, Alexander & Baldwin, Inc., was placed under severe restraints in the routing of its cargo and otherwise. The terms of the consent decree are set forth in Appendix E, *infra*, p. 88. We include this decree in order to make the point that the Act is not concerned with the enforcement of the antitrust laws, and that any problems in this area have been taken in charge by the Department of Justice. (SD 16, pp. 57-60, 127-29; SD 20.)

> cient to carry its domestic water-borne commerce.' This unmistakably charges us with responsibility for protecting and preserving domestic water carriers. We are not unmindful of the generally unfortunate plight in which the United States domestic fleet finds itself." *States Steamship Co.—Additional Calls at Hawaii,* 1 M.A. 131, 135 (1961).

The Hearing Examiner reflected the force of these decisions in his own Recommended Decision in the instant case when he correctly stated:

> "Basically, the Act elevates a subsidized operator to a most favored financial position, one that is not shared by domestic operators, who must sink or swim on their own abilities." (1 M.A. at 64.)

Particularly relevant in this regard is *Pacific Far East Line, Inc. — Section 805(a) Applications,* 4 F.M.B. 580 (1955). In that case the applicant sought to provide general agency services for a domestic operator, and the only evidence of record respecting subsidy diversion reflected that the estimated fees to be paid for the general agency services would be sufficient to cover the "added cost" of providing such services. Applicant failed to show what the total cost of providing such services would be. In this state of the record, the Board held that the applicant had failed to establish the absence of subsidy diversion into the proposed domestic operation, stating as follows:

> "Performance of the proposed general agency by PFEL on an added cost basis, however, would result in an advantage to Coastwise. Whether this advantage amounts to unfair competition, however, cannot be determined from this record. * * * We cannot, therefore, make the statutory finding that the proposed agreement will not result in unfair competition." (4 F.M.B. at 591.)

The Secretary's decision in the instant case, as affirmed by the courts below, cannot be squared with the terms of Section 805(a) or its purpose and policy as revealed by the foregoing legislative history, and as affirmed in the administrative decisions above cited.[16]

C. Other Section 805(a) Cases in the Courts of Appeals.

Apart from the instant case, there have been only two cases in the courts of appeal construing Section 805(a). The reasoning and analysis of both cases, although not their decisions, conflict with the Secretary's decision in the present case and its affirmance by the courts below.

In *Seatrain Lines v. Hodges,* 320 F.2d 737, 740 (D.C. Cir. 1963), the court referred to the anti-diversion paragraph of Section 805(a) as follows:

> "The obvious purpose is to preclude having any part of the subsidy aid the domestic operations, for which no subsidy is available, and to prevent an advantage for one carrier to the detriment of his domestic competitors."

In *Pacific Far East Line, Inc. v. FMB,* 275 F. 2d 184, 186 (D.C. Cir. 1960), certiorari denied, 363 U.S. 827, the same court stated:

> "The Department of Justice, on behalf of the United States, urges that competition is not 'unfair' within the meaning of the Act when it does not involve diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator. Congress plainly did intend to prevent that sort of competition".

That case (unlike the present case) involved a proposed exclusively domestic service to be conducted by a subsidized

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16. Other administrative decisions, which have unhappily departed from the clear meaning and purpose of Section 805(a), are referred to under IV, *infra,* pp. 30-31.

operator but with *unsubsidized* vessels. On the evidence, the court held that the Board had not shown that the proposed domestic service would be "unfair". The court remanded the case to the Board for further findings on the question of prejudice to the objects and policy of the Act.[17]

In this case, the court further gave as an example of unfair competition, "fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss" (275 F.2d 184, 186). The last-quoted language strikingly fits the present case, although the Secretary's decision failed so to apply it. During most of the years of record Matson's earnings provided far less than a fair return on its investment and, beginning in September, 1959, Matson was forced to take cognizance of rising costs by effecting rate increases. By August, 1964, due in large measure to the success of its container program, Matson completed a cutback process restoring its rates in general to the August, 1961, level. During the five years from September, 1959, to August, 1964, States called at Hawaii 13 times annually in each direction; its labor costs were the same as Matson's; and, even on an incremental basis, its earnings from the domestic trade, like Matson's, were inadequate. Yet States consistently during these five years maintained its domestic rates at levels below Matson's, the disparity during one period amounting to 35%. (STr. 6220-25, 7573-74; SD16, pp. 136-40.) Plainly, States was able to maintain such rates only because of subsidy. Indeed, even today, in view of the domestic loss on the 26 voyages, States would have to increase its West Coast-Hawaii rates merely to break even. We have, therefore, in the instant case the example

17. Pacific Far East Line thereafter withdrew its application to serve Hawaii, and the Board therefore made no further decision in the case (SA64, p. 2, fn. 4).

to which the court of appeals referred in the *Pacific Far East Line* case: "fixing rates below cost and using the profits of its subsidized Far East service to carry the loss. . . ."

The decision of the court of appeals herein, affirming the district court and leaving in effect the Secretary's decision, conflicts in principle with the reasoning and analysis of Section 805(a) in the *Pacific Far East Line* and *Seatrain* cases, *supra;* and decides an important question of federal law, concerning the administration of Section 805(a), which has not been, but should be, settled by this Court. No less than in the recent case of the "debit agents", certiorari should be granted, to paraphrase the language of the Court, in view of the "importance of the question in the context involved to the administration" of the Merchant Marine Act, 1936, as amended. *NLRB v. United Ins. Co.*, 19 L.Ed.2d 1083, 1086 (1968).

II.

THE NECESSITY OF APPLYING FULLY DISTRIBUTED COSTS.

The law seems to be clear that when the true cost of carrying on some one portion of an overall enterprise must be determined, a fully distributed cost basis — that is, a fair method of allocating *all* costs — is the only method sanctioned. Here the "portion" referred to is the transportation of domestic cargo on the 26 trans-Pacific voyages, and the "over-all enterprise" is the 26 mixed voyages between the West Coast and the Far East via Hawaii, which engage in the transportation of both domestic and foreign cargo.

This Court held that the method of fully distributed costs was essential to decision in *Northern Pacific Ry. Co. v. North Dakota,* 236 U.S. 585, 596-97 (1915):

"[W]e entertain no doubt that, in determining the cost of the transportation of a particular commodity, all the outlays which pertain to it must be considered. We find no basis for distinguishing in this respect between so-called 'out-of-pocket costs,' or 'actual' expenses, and other outlays which are none the less actually made because they are applicable to all traffic, instead of being exclusively incurred in the traffic in question. Illustrations are found in outlays for maintenance of way and structures, general expenses and taxes. It is not a sufficient reason for excluding such, or other, expenses to say that they would still have been incurred had the particular commodity not been transported. That commodity has been transported; the common carrier is under a duty to carry, and the expenses of its business at a particular time are attributable to what it does carry. The State cannot estimate the cost of carrying coal by throwing the expense incident to the maintenance of the roadbed, and the general expenses, upon the carriage of wheat; or the cost of carrying wheat by throwing the burden of the upkeep of the property upon coal and other commodities. This, of course, does not mean that all commodities are to be treated as carried at the same rate of expense. The outlays that exclusively pertain to a given class of traffic must be assigned to that class, and the other expenses must be fairly apportioned. It may be difficult to make such an apportionment, but when conclusions are based on cost the entire cost must be taken into account."

To the same effect holding mandatory the application of fully distributed cost accounting are, for example, *Government of Guam v. FMC*, 329 F.2d 251 (D.C. Cir. 1964) and *Alaska Steamship Co. v. FMC*, 344 F.2d 810 (9th Cir. 1965). Indeed, the predecessor of the present Maritime Subsidy Board held it necessary to probe beyond incremental accounting in *Pacific Far East Line, Inc.—Section* 805(a)

Applications, 4 F.M.B. 580 (1955), which has been quoted in part, *supra* p. 22.

As we have seen, Section 805(a) requires that the profitability of the domestic operation be determined, in a mixed voyage situation such as is here involved, in order to gauge the dimension of subsidy support. This in turn, requires the test of fully distributed costs, or, if not, some other test (unknown to us) to be explained and justified by the administrative agency or official who administers Section 805(a). Section 805(a) does not present a case where the administrative agency is given broad discretion "as to the proper balance to be struck between conflicting interests," Congress itself having made that determination (See *NLRB v. Brown,* 380 U.S. 278, 292 (1965); also *American Ship Building Co. v. NLRB,* 380 U.S. 300 (1965). Accordingly, the Secretary has decided an important question of federal law, involving the application of Section 805(a), in a way in conflict with applicable decisions of this Court.

We do not suggest, of course, that incremental accounting does not have its place in the business or even the legal world. Sometimes a railroad may be permitted or even required to carry some commodities at less than their fully distributed costs of transportation. See *Baltimore & Ohio R. Co. v. United States,* 345 U.S. 146 (1953). Such cases do not touch the point here involved. The question is what test does the substantive law require. The *Baltimore & Ohio* case did not deny that the test of fully distributed costs was the measure of whether the rates there involved were below full cost.

The recent case of *American Lines v. Louisville & N.R. Co.,* 20 L.Ed. 2d 1289 (1968), wherein the action of the Interstate Commerce Commission in its application of fully distributed costs was affirmed, involved a statute, which, read in the light of its legislative history, apparently left the

Commission with a considerable area of discretion as to the accounting test to be considered. Section 805(a), read in the light of its legislative history, seems to circumscribe the discretion of the administrative agency much more strictly. The *American Lines* case is of significance in the present context both because of the test which the Commission there applied, and because of this Court's discussion of the important and perhaps never-ending conflict between fully distributed costs and incremental or "marginal" costs.

III.

THE SECRETARY'S PURPORTED BALANCING EXERCISE.

The Secretary's decision endeavors to balance subsidy support of the domestic operation against "equalizing forces" and perhaps other considerations (App. C, pp. 67-68). Assuming for present purposes that such a balancing exercise is permissible, the difficulty at this point is that the Secretary has never determined *what* he is balancing against such equalizing or other forces (pp. 14-15, *supra*). Exactly as in the recent case of *United States v. Third National Bank*, 390 U.S. 171 (1968), a remand is in order so that the balancing operation can be properly performed. As the Court there concluded (pp. 183-84):

> "To weigh adequately one of these factors against the other requires a proper conclusion as to each. Having decided that the court below erred in assessing competitive impact, we should remand, so that the District Court can perform again the balancing process mandated by the Act." (Footnote appended to quotation omitted.)[18]

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18. The district court in the present case seems to have accepted, although in a backhand manner and without discussion, the need for full absorption accounting. Further, the district court seems to have assumed at one point a consequent loss in the domestic operation of some $1,200,000 annually. (App. B. pp. 22-23.) If we are correctly reading the district court's opinion, the diffi-

IV.

THE CHAOTIC ADMINISTRATION OF SECTION 805(a).

Following the decision of the Court of Appeals for the District of Columbia Circuit in *Pacific Far East Line, Inc. v. FMB, supra,* in 1960, the Board (as well as Matson) unsuccessfully petitioned for certiorari. No. 907, October Term, 1959, 363 U.S.827. The Board's petition maintained that, in reversing and remanding on the issue of unfairness, the court of appeals had brought into question numerous prior Board decisions; that the issues involved were of "wide importance" (petition, p. 9); and that (pp. 15-16):

> "Moreover, relaxation of the standards of Section 805(a) may be expected to encourage many additional subsidized operators to seek to invade the domestic trades. Thus, the decision of the Court of Appeals is likely to have a disruptive effect upon all of the domestic trades and to discourage the lines currently dedicated to these trades from attempting to continue in them. This would be detrimental both to the national defense and to the maintenance of stable and dependable common carrier water services to the areas involved."

The intervening years would seem to have justified the concern of the Board as expressed in 1960. Apart from the present case, attempted invasions of the domestic trades by American Export Lines and Grace Line with their subsidized vessels are reflected in the decisions of Secretary Hodges heretofore cited (*supra,* pp. 11, 21). Attempts by

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culty remains that the Secretary of Commerce made no such findings or assumptions. The balancing operation, if it is permissible, is to be performed by the administrative agency or official, and not by the reviewing court, as is clear from the teaching of *Burlington Truck Lines v. United States,* 371 U.S. 156, 168-69, and the decisions therein cited.

subsidized lines or their affiliates to employ non-subsidized vessels in domestic commerce are reflected in *American Export Isbrandtsen Lines, Inc., Section 805(a) Application*, Pike & Fischer, Shipping Regulation Reports, 9 SRR 997 (1968) (the *AEIL* case) and in the pending MSB Docket No. S-191, *American President Lines, Ltd.—Application to Serve Hawaii.*[19]

Further, the years since 1960 have produced their jungle of erratic and contradictory decisions at the various administrative levels. The instant case, with its five disparate decisions through the Secretary's decision here under review, provides a not atypical example. In the *AEIL* case, in which review by the Secretary was denied, the Maritime Subsidy Board has recently departed quite plainly from the very decision of Secretary Connor in the instant case, as well as from other prior decisions, and has relaxed to virtually the point of extinction the safeguards intended by Section 805(a). The Board among other matters suggested, contrary to the decision herein and to other decisions, that as a matter of law the profits of a subsidized shipping line may be used by a parent holding company in domestic commerce (9 SRR at 1002-03); that, once the issue of unfair competition has been determined adversely to a statutory intervenor under Section 805(a), he is not entitled to a hearing on the second issue of prejudice to the objects and policy of the Act (9 SRR at 1004); that the agency and operating relationship of a subsidized line in furnishing services to vessels operating in domestic commerce, including the question of whether such services are

19. It may be noted that Seatrain Lines, Inc. has recently announced its plans to enter the West Coast-Hawaii trade, and one of its officers outlined its plans as a witness in Docket No. S-191. Seatrain falls outside Section 805(a); as an unsubsidized carrier, it is free to enter the Hawaii domestic trade at any time, without any governmental permission or franchise.

in fact fully compensated, are matters to be handled *ex parte,* on which statutory intervenors are likewise not entitled to be heard (9 SRR at 999, 1003); and that the adequacy of the service presently provided by unsubsidized operators in a domestic trade, and the financial impact of the proposed service upon such operators, are immaterial to the granting of Section 805(a) permission (9 SRR at 1004).[20] We do not suggest, to be sure, that the Court review the *AEIL* case in this proceeding; we do believe it of relevance in deciding whether certiorari should be granted.

We have not in this petition discussed numerous matters which will likely be the subject of briefing in the event certiorari is granted. These would include the adequacy of the service in the West Coast-Hawaii trade, past, present and prospective; the financial impact of subsidized competition on Matson and other unsubsidized operators, and the chilling effect which subsidized competition has upon the entry of prospective, unsubsidized operators into the trade; the fact that the permission given States is unlimited as to the tonnage it may carry in the domestic trade on the 26 voyages referred to; the evidence that States intends to reserve some 40% of its vessel space on westbound voyages for domestic cargo (App. C, p. 80); and the circumstances leading to the Secretary's provision for a three-year review proceeding (App. C, pp. 84-85), which review, however, assumes the validity of his decision.

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20. The Board cast aside, virtually without mention, the Examiner's decision in the case (9 SRR 161). The case was an unusual one, but the Board itself regarded its declarations of the law to be applied as having "precedential effect" (9 SRR at p. 1001).

Also, we have not in this petition detailed the evidence supporting Matson's determination of a loss in the domestic operations, as sustained by the Hearing Examiner and as adverted to by the Secretary and the district court, in the range of $905,458 to $1,280,416 annually (which we have referred to in this petition as a loss in the order of $1,000,000). In this connection, at Appendix F, p. 94, we have included a table, with supporting references, which was included in our brief to the courts below. Further, if certiorari is granted, Matson will desire to argue that its evidence on the question of domestic losses is *prima facie* correct, and, on remand, is to be accepted unless the Secretary can point out specific deficiencies, or selects, with justification, some accounting method other than that of fully distributed costs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Matson Navigation Company

September, 1968.

Appendix A

United States Court of Appeals for the Ninth Circuit

No. 21,340

MATSON NAVIGATION COMPANY,
Appellant,

vs.

JOHN T. CONNOR, Secretary of Commerce,
Appellee.

[May 17, 1968]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and ELY, Circuit Judges,
and BYRNE, Senior District Judge*

PER CURIAM:

Our examination of the record, the opinion of the Secretary, the briefs, the statutes and the applicable authorities leads us to the conclusion that the case was correctly decided by the District Court. Accordingly, and for the reasons stated by Judge Wollenberg in his opinion, *Matson Nav. Co. v. Connor,* D.C.N.D. Cal., 1966, 258 F.Supp. 144, the judgment appealed from is affirmed.

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*Honorable William M. Byrne, Senior District Judge, United States District Court, Central District, California, sitting by designation.

United States Court of Appeals for the Ninth Circuit

No. 21,340

MATSON NAVIGATION COMPANY,
Appellant,

vs.

JOHN T. CONNOR, Secretary of Commerce,
Appellee.

Appeal from the United States District Court for the Northern District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered May 17, 1968

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Friday, June 21, 1968

Before: DUNIWAY and ELY, Circuit Judges,
and BYRNE, Senior District Judge*

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, it is ordered that the petition of appellant filed June 17, 1968, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

*Honorable William M. Byrne, Senior District Judge, United States District Court, Central District, California, sitting by designation.

Appendix B

In the United States District Court for the Northern District of California, Southern Division

Filed—Aug 10 1966

Civil No. 44080

MATSON NAVIGATION COMPANY,
Plaintiff,

vs.

JOHN T. CONNOR, Secretary of Commerce,
Defendant,

STATES STEAMSHIP COMPANY,
Intervenor Defendant,

SAN DIEGO UNIFIED PORT DISTRICT,
Intervenor Defendant,

MEMORANDUM OPINION AND ORDER

Matson Navigation Company has asked this Court to set aside Secretary of Commerce Connor's order (hereinafter S.C.D.) granting an application of the States Steamship Company, a subsidized operator, for permission to double its sailings (from 13 to 26) in the domestic California-Hawaii trade in competition with Matson, an unsubsidized exclusively domestic operator in that trade.[1] States Steam-

1. The Merchant Marine Act (the "Act") 46 U.S.C. 1101-1294 as amended, provides for the subsidy of American ships in foreign operation if they meet certain requirements. Construction-differential subsidy (CDS) is paid to make the cost of United States built ships to the American-flag owner comparable to his foreign-flag competitor's overseas construction costs. 46 U.S.C. 1151-1161. Operating-differential subsidy (ODS) is the subsidy paid to establish operating cost parity between contractors and their foreign-flag competitors. 46 U.S.C. 1171-1182. States Steamship Company has received sizable amounts of dollar subsidy under both ODS and CDS provisions. Matson, an unsubsidized exclusively domestic operator in the California-Hawaii trade has received no subsidy for its operations in that area.

ship Company (States) and the San Diego Unified Port District have joined the United States in opposing the motion as intervenor defendants. These defendants have filed cross motions for summary judgment in favor of the Secretary of Commerce. The issue before this Court is whether the Secretary's decision is supported by substantial evidence and whether it applied legal standards consistent with the Congressional intent embodied in the Merchant Marine Act of 1936.

States Steamship Company (hereinafter "States") operates a subsidized shipping service between California and the Far East. In January, 1961, States filed with the Federal Maritime Board[2] an application for permission under Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C.A. Sec. 1223(a) to increase its intermediate service between California and Hawaii from 13[3] to 26 calls per year in each direction on the sailings of its subsidized ships on Trade Route 29, between California and the Far East. The Harbor Commission of the City of San Diego intervened in behalf of the applicant; Matson Navigation Company (hereinafter "Matson") and the State of Hawaii intervened in opposition. During the next five years, after the submission of the application, five different administrative decisions, some granting and some denying the application were issued respectively by the Hearing Examiner of the

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2. By authority of Reorganization Plan No. 7 of 1961, effective August 12, 1961, the Maritime Subsidy Board succeeded the Federal Maritime Board as to jurisdiction over the States Application herein.

3. In January, 1953, States was granted permission under Sec. 805(a) to make 13 domestic calls at Hawaii in each direction. *Pacific Transport Lines, Inc. Sec. 805(a) Application, Docket S-18 (Sub. No. 1).* Matson made no objection to the original grant of 13 calls. It is only the 13 additional calls applied for in 1961 which are at issue in this case.

Maritime Commission (March, 1963), the Maritime Subsidy Board (Oct. 7, 1963), Secretary Hodges (Apr. 1964), Review Examiner (Mar. 1, 1964), and Secretary Connor (July 6, 1965)[4].

The case now has reached epic proportions in its duration and in the sheer volume of its certified record which could seemingly fill the largest hull of any of the carriers involved.[5] The conflicting administrative decisions reflect the general disagreement over the order of importance which

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4. Briefly the history of the disposition of the disputed application below went as follows: In March, 1963, the Hearing Examiner served his Recommended Decision, concluding that to grant States' application would result in unfair competition to Matson and be prejudicial to the objects and policies of the Act. The maritime Subsidy Board took the decision under review, and in a Final Opinion and Order, (decided Oct. 7, 1963) the Board rejected the Recommended Decision and granted the requested permission. The Secretary of Commerce (then Hodges) decided on Jan. 6, 1964 to stay the Board's action and to review the Board's Opinion and Order. Secretary Hodges found on Apr. 23, 1964 that the Board's decision would be prejudicial to the objects and policies of the Act. Secretary Hodges however did authorize States to make the additional calls requested but subject to a condition that the right of refusal upon two weeks notice be given to the unsubsidized operators in the trade. In Dec. 1964 Secretary Hodges set aside his earlier decision and designated a Review Examiner to further consider the application. The Review Examiner concluded that no permission is required under 805(a) where a subsidized operator in foreign trade wishes to make intermediate calls at Hawaii on subsidized voyages, because Secs. 605(a) and 506 grant express permission for such mixed voyages and provide protection for exclusively domestic carriers through pro-rata reduction and refund of subsidy for the domestic portion of the mixed voyage. Exceptions to the Review Examiners decision were taken by Matson and Hawaii. The case then went to Secretary Connor (who had succeeded Secretary Hodges) for decision, against a background of four previous decisions at various administrative levels, two of which approved States' application and two of which denied the application.

5. The agency proceedings alone produced 7,718 pages of transcripts of hearings and testimony. Over 2,500 printed pages of written argument in briefs have been submitted along the line of review.

the various avowed purposes of the Merchant Marine Act should be given. Somewhere in the numerous decisions rendered each party of interest was able to glean a supportive theory and attest to its justness in the light of reason and legislative history. However, since this Court need only consider the final order issued by Secretary Connor granting the application of States, it is unnecessary to discuss here the prior orders and recommendations by the other administrative officials except as they were expressly relied upon by the Secretary. All this Court can do with this case as it rests here on its long journey toward ultimate disposition is to test the Secretary's decision under the proper scope of judicial review.

This Court is mindful of its carefully restricted task in reviewing the Secretary's decision. While the Court is not obliged to stand aside and rubber stamp its affirmance of administrative decisions, which it deems inconsistent with a statutory mandate, *N.L.R.B. v. Brown,* 380 U.S. 291 (1965); it must at the same time guard against the danger of "sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 194 (1941). Where findings of fact are concerned the scope of review extends only to an inquiry as to whether there is substantial evidence in the record to support them. The Court may not weigh the evidence anew and substitute its judgment for that of the Secretary. *Minneapolis & St. Louis R. Co. v. United States,* 361 U.S. 173, 189 (1959). As to any new standard of operation or policy judgment adopted by the Secretary in his decision, the Court must be satisfied that such standard is consistent with the authority and discretion granted by Congress. *National Broadcasting Co. v. United States,* 319 U.S. 190, 224. The wisdom of the principle adopted is not

this reviewing Court's concern as long as it has a definitely rational and statutory foundation. *Securities Commission v. Chenery Corp.*, 332 U.S. 194, 207 (1946). "Nevertheless where a newly adopted standard involves a major policy judgment as to the balance to be struck between conflicting interests, the Court must scrutinize it with care and strike it down if it results in an unauthorized assumption by the Secretary of major policy decisions properly made by Congress." *American Shipbuilding Co. v. N.L.R.B.*, 380 U.S. 300 (1965).

The Secretary's decision, herein challenged, granted States permission under Section 805(a) to increase its intermediate service between California and Hawaii from 13 to 26 calls per year on the sailings of its subsidized ships on Trade Route 29 between California and the Far East. In reaching his decision, the Secretary found that approval of State's application would not result in unfair competition to Matson within the meaning of Section 805(a) and that approval of State's application would not be prejudicial to the object and policy of the Act within the meaning of Section 805(a).[6] Matson has vigorously attacked both findings

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6. Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C.A. Sec. 1223(a), forbids the payment of a subsidy to any person who, without written permission from the Board, owns or operates vessels "in the domestic intercoastal or coastwise service", which of course includes the California-Hawaii trade that States seeks to enter. Persons interested in an application for such permission are authorized to intervene before the Board and the Board is required to "give a hearing to the applicant and the intervenors". The Board is not to grant permission if the Board "finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter." It is made a misdemeanor for one who has received such permission "to divert directly or indirectly, any moneys . . . used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operation . . .".

as being contrary to the policies of the Act, inconsistent with legal precedent, and unsupported by substantial evidence. This Court has carefully considered all of the arguments suggested by the protesting carrier Matson. However, for the reasons given below, the Court holds that the Secretary's findings are warranted by law, are supported by substantial evidence, and are clearly within the authorized discretion and statutory responsibility of the administrative agency.

The Secretary concluded that no unfair competition to Matson would result if States application were granted. In arriving at this conclusion, the Secretary conceded that States, the subsidized operator, would have a residual subsidy benefit to some degree supporting its domestic service (California-Hawaii). However, the Secretary maintained that "equalizing forces" such as statutory and contractual restrictions on States, "government aid in various forms to domestic operators" (Matson) and potential "growth in the trade" were to be weighed in the balance. (S.C.D. p.53). The decision concludes that States' additional sailings would "not seem to pose a serious threat" and "would not have such a competitive effect on Matson as to lessen substantially the ability of Matson to compete for available cargo." (S.C.D. p.63). Thus the Secretary, in defining unfair competition, adopted a new standard or test of "substantial competitive advantage" while applying Section 805(a) to a subsidized carrier engaged in a "mixed voyage".[7] The ulti-

7. A mixed voyage is one on which the vessel is operated in both the domestic and subsidized foreign trades on the same voyage. The mixed voyage situation carries with it two inherent possibilities flowing from the proration formulas established by Secs. 506 and 605(a) of the Act. (providing for subsidy proration according to the degree of domestic operation) . . There is first the possibility that proration will not remove all subsidy from the contractor's operations along the domestic portion of the mixed

mate disposition of this case depends almost totally on whether this new standard or test is consistent with the statutory mandates of Section 805(a) and whether its adoption can be rationally derived from the Congressional intent embodied in the Merchant Marine Act. As stated above, the establishment by an Agency of a new standard which involves such a major policy judgment must be closely scrutinized by a reviewing court against the statutory language, the legislative intent, and the applicable case law.

Turning first to the statutory language, Section 805(a) specifically requires the denial of permission for subsidized vessels to operate in the domestic trade if such permission would result in "unfair competition" to exclusively domestic operators. However, "unfair competition" is not defined in the Act. This is not unusual where a statute gives an agency a broad policy directive, such as the maintenance of both domestic and foreign water borne commerce and promotion of a merchant marine capable of serving as a naval and military auxiliary in time of war or national emergency. (Section 101 of the Act). In such cases it is customary to state the policy ends broadly and leave to the agency the adaption of means to the desired end. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941), *Federal Security Administrator v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943), *SEC v. Chenery Corp.*, 332 U.S. 194, 208 (1947), *Swayne & Hoyt, Ltd., v. U.S.*, 300 U.S. 297 (1937), *Mitchell v. Budd*, 350 U.S. 473, 480 (1956).

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voyage but that a residue may remain as in this case. There is second the further possibility that such residual subsidy will exceed the contractor's need for support of his carriage of cargo in the foreign trade along the domestic portion of the mixed voyage. If so it would be available to help the contractor in domestic trade and, if large enough to create unfair competition or prejudice to the objects and policy of the Act, would require denial of the application. (S.C.D. pp. 35, 39-40).

Where general and imprecise terminology is inserted in a statute, the agency must have broad discretionary power to protect the multiple interests at stake.

Sections 506 and 605(a) of the Act contemplate exceptions to the general scheme of allowing subsidy for foreign operations only. These exceptions exist as to vessels on four specified kinds of mixed voyages, including vessels on "a voyage in foreign trade on which the vessel may stop at the State of Hawaii" providing subsidy is prorated according to domestic operation.[8] Yet Section 805(a) directs the Secretary not to permit the operation of subsidized vessels in domestic waters if he "finds it will result in unfair competition" to exclusively domestic operators, or that it would be "prejudicial to the objects and policies of this Act." The three sections of the Act are not irreconciliable as some of the parties have contended. In sections 506 and 605(a) Congress clearly contemplated that Hawaii might be called at by subsidized vessels in the mixed trade, provided that their operators complied with the plan provided for subsidy proration. In Section 805(a) Congress added the further requirement that such mixed calls would not result in unfair competition for exclusively domestic operators. Thus the exclusive domestic operator is given a double protection from the subsidized carrier. First the subsidized carrier is required to return a portion of its ODS and CDS according to the statutory formula. If after the rebate there is still a residue of subsidy benefit in any form remaining, and if that benefit would be likely to result in unfair competition to the

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8. Proration is the diminution of subsidy to a contractor engaging in a mixed trade. It is achieved by the refund of construction-differential subsidy (CDS) and reduction of operational-differential subsidy (ODS) according to statutory formulas set out in Sections 506 and 605(a) of the Act. 46 U.S.C. 1156 and 1175(a) respectively.

domestic operator, then the subsidized carrier is to be denied entry into the domestic market.

The Secretary in this case found that even after proration under 506 and 605(a), there was some residual subsidy benefit to States. He, therefore, had to decide whether States residual benefit would result in "unfair competition" to Matson. He had to face for the first time the competitive situation presented by States mixed service. He concluded that no unfair competition would result since the admitted competitive advantage arising out of the residual subsidy when tempered by certain equalizing factors would, in his opinion be insubstantial. In concluding that the statute permitted him to adopt the standard of "substantial competitive advantage" as the cutoff point for admissibility of subsidized vessels into the domestic waters, the Secretary rejected Matson's position urged before him on this point.[9] Matson contended that any subsidy at all (more than de minimus) which might remain to the subsidized applicant with regard to the domestic trade after proration under Section 506 and 605(a) had occurred would be per se unfair to unsubsidized operators in that trade regardless of equal-

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9. The Secretary in his decision also rejected the position advocated by States and adopted by the Review Examiner. States had urged that by including in Sections 506 and 605(a) of the Act provisions for subsidy proration Congress intended as a matter of law to eliminate in the mixed voyage type of case any question of unfair competition flowing from subsidy support of domestic operation by the applicant in competition with an unsubsidized operator in the same domestic trade. The Secretary said in his opinion at p. 35: "to adopt the theory that, although 805(a) is assumed to apply, 506 and 605(a) subsidy proration provisions as a matter of *law* eliminate unfair competition from subsidy despite what the consequences may be as a matter of fact to the unsubsidized domestic operator, would imply an unawareness or a disregard on the part of Congress of the unfairness of situations even where substantial subsidy remaining after proration is used to significant advantage over an unsubsidized operator in a domestic trade. I am unwilling to imply such unawareness or disregard to Congress and I do not adopt the theory."

izing factors. (Matson memo pp. 41, 48). In support of its position, Matson cited the legislative history and case law surrounding Section 805(a) which it construed to be at odds with the Secretary's new standard of unfair competition. The Court rejects Matson's contentions.

The purposes surrounding the enactment of the Merchant Marine Act of 1936 as announced by both the administration, the Congress and Section 101 of the Act were to promote and develop a strong American merchant marine to serve American shippers in time of peace, to provide for the continuance of neutral peaceful trade in time of war in which the United States was not involved, and to provide naval auxiliaries and the maintenance of necessary and commercial intercourse in time of war in which the United States was involved. Accordingly, the 1936 Act was primarily designed to develop the carriage of the nation's foreign commerce by United States flag vessels in time of war and peace through payment of construction subsidy and operating subsidy for use in competition with lower cost foreign flag vessels. Another important purpose of the Act was to promote the maintenance of an unsubsidized, privately owned merchant fleet sufficient to carry the nation's "domestic water-borne commerce" (Section 101 of the Act.) In connection with this aim, Congress sought to curb abuses in the operation of the pre-1936 Government subsidy program, particularly the mail subsidies system. These abuses (which had harmed the unsubsidized operators) included "the improper operating of subsidiary companies, the payment of excessive salaries, the engaging in businesses not directly a part of shipping, and other abuses which have made for poor management, improper use of profits, and scattered efforts. (74th Cong., 1st Sess., House Document No. 118, March 4, 1935). The most common

abuses in the domestic trade under mail subsidy were clearly shown by the legislative history to relate to two distinct types: (1) the creation by the recipents of mail subsidies of subsidiary or affiliate corporations to operate in the domestic trade and to which to pipe subsidy funds from the parent contracting firm, and (2) subsidy payment to and receipt by contractors who were almost exclusively domestic in their operations because they happened to touch at a foreign port incidental to their domestic routes.[10] The Black and Farley Reports which led to adoption of Section 805(a) recommended that subsidy not be paid to an operator whose business or interests are in the domestic trade nor for the benefit of any operator whose financial or corporate structure permits subsidy diversion into other than bona-fide American flag foreign-trade shipping enterprises. (Investigation of Air Mail and Ocean Mail Contracts. Senate Report No. 898, 74th Cong. 1st Sess. (1935, p.14). In aggregate it may fairly be concluded that in addition to other primary objectives sought to be served, the Merchant Marine Act of 1936, was enacted to curb the many abuses disclosed by the Farley and Black Reports. It is also a fair summation

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10. From 1920 to 1936 millions of dollars of Government mail subsidies were paid, pursuant to the Merchant Marine Acts of 1920 and 1928, for the presumed purpose of maintaining United States flag service on the foreign trade routes. As matters developed, however, a substantial part of the Government funds paid out was diverted into the domestic trade and into the pockets of steamship operators. These abuses were disclosed in a series of investigations held first by Postmaster General Farley and then by a special Senate committee chaired by Senator Hugo Black. According to the Farley Report, "millions of dollars of mail pay had been diverted from use in foreign trade and used to operate in intercoastal and coastwise trade resulting in unfair competition with nonsubsidized American lines in the same trade." (House Document No. 118, 74th Cong. 1st Sess. (1935) (p. 9). The Black Committee report was equally emphatic and stated:

> It surely cannot be contended that Congress ever intended mail contracts to be let on links of intercoastal routes wherein

of the legislative intent to conclude that Section 805(a) was intended to guard against potential abuses of the new ODS and CDS provisions contained in the 1936 Act.[11] However, there is nothing in the legislative history which requires the conclusion that Congress thought "unfair competition" necessarily would result from granting an 805(a) application to an operator seeking permission, while receiving subsidy, to serve one of the mixed foreign and domestic trades enumerated in Sections 506 and 605(a) when subsidy in any (for even something more than a de minimus) amount would remain, after proration, in the domestic segment.

To the contrary, it is quite reasonable to conclude from the Act and the legislative history that Congress did not regard a residual subsidy benefit in a mixed voyage as necessarily being unfair competition. Nowhere in Section 101 of the Act is there any suggestion of a policy against American-flag vessels promoting both the foreign and domestic commerce of the United States on the same voyage. In fact, Congress expressly showed its awareness of these objectives being obtained through such mixed voyages by providing in Sections 506 and 605(a) of the Act four specific and identical instances (including Hawaii) in which vessels

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the competition to be faced by the operator was only from other American interests. This was well known to Government officials administering the Merchant Marine Act of 1928, but despite that knowledge such contracts were let and are being operated. Thus there is placed in the hands of the favored contractor a murderous economic weapon to be used against his American competitors in a trade wherein vessels of foreign registry may not engage. (Investigation of Air Mail and Ocean Mail Contracts Senate Report No. 898, 74th Cong. 1st Sess. (1935), p. 14)

11. The concluding paragraph of Section 805(a) makes it unlawful and a misdemeanor—for a subsidized operator "to divert directly or indirectly, any moneys, property, or other thing of value, used in foreign trade operations, for which a subsidy is paid by the United States," into any "domestic operation".

engaged in such mixed foreign and domestic voyages would be eligible for both CDS and ODS, providing that CDS originally paid to the shipyard by the government was repaid by the ship operator and that ODS otherwise payable to the ship operator was reduced proportionately to such participation in domestic trade under a formula prescribed by Congress in those sections. The Defendant Secretary pointed out that these sections indicated Congress contemplated that it would be in the public interest for subsidized carriers to provide mixed service in those trades in some cases. (S.C.D. 73-74). It was even foreseen at the Congressional hearings that proration might not always remove all benefits of subsidy to an operator of a combination foreign-domestic service in competition with an unsubsidized operator in the domestic trade.[12] Aware of this possibility, Congress failed to promulgate legislation which expressly and specifically

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12. The Secretary referred to the fact that early drafts of Sections 506 and 605(a) containing refund and reduction of subsidy provisions, "resulted in protests by domestic operators on the ground of probable unfair advantages a subsidized operator would have in the mixed trades despite such protection." The Secretary said that the forerunners of Section 805(a) were added as an additional protection to unsubsidized operators. (S.C.D. pp. 14-15). See also the testimony of J. C. Peacock, Director of the U.S. Shipping Board Bureau, Dept. of Commerce. Hearings on S 3500, Committee on Commerce, Senate, 74th Cong. 2d Sess. (1936) pp. 75-76, which reflects an awareness of potential residual subsidy:

> Mr. Peacock: I think the provision that is made , . 506 and 605(a) is the best that can be made under the circumstances. After all, this is theoretical. I would not assume to say there might not be some cases where there was still some real discrimination left, and the importance of that has, I think to be judged in connection with what is the principal purpose of the bill.
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> The Chairman: Somebody might be pinched, but in case of a national emergency the national defense would be better preserved if we had ships, no matter where they operated in between times; is that your position?
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> Mr. Peacock: I think so, if that is the principal purpose of the bill.

outlawed *any residual subsidy*[13] and instead adopted the broader standard of "unfair competition" embodied in Section 805(a). Accordingly, the fairest reading of the provisions of the Act itself and the legislative history behind it indicate that because of the multiple purposes of the Act and because of the unforeseeable complexity and variety of competitive relationships which would be posed by applications under Section 805(a), Congress set forth no automatic or mechanical formulas and established no per se standards. Rather it entrusted the Secretary with considerable discretion in determining when unfair competition would result from a residual subsidy.

In reaching his decision, the Secretary carefully considered the opinion of the Court of Appeals for the District of Columbia in the PFEL case,[14] which is the only major case discussing unfair competition under Section 805(a). This Court agrees with the Secretary that the thrust of the *PFEL* case is its rejection of the doctrine of fundamental entitlement whereby domestic operators would be protected from competition which was not subsidized. Everything else in that opinion is dictum which in large part is inapplicable to the facts in this case. *PFEL* was not a mixed service case. It involved a subsidized operator's application for permission to operate unsubsidized vessels in domestic waters. There is no possibility in such a situation for residual subsidy passively to remain after proration from the subsidized operations to assist the separate unsubsidized operations. To the contrary, the case at bar presents the distinct

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13. Some of the bills introduced in Congress prior to enactment of the 1936 Act contained specific prohibitions against payment of subsidies to any carriers operating in the domestic trade. None of those provisions were retained in revised H.R. 8555, which became law. See H.R. 7854 (May 2, 1935) and H.R. 7981 (May 9, 1935).

14. *Pacific Far East Lines, Inc. v. Federal Maritime Board*, 275 F.2d 184 (D.C. Cir. 1960) Cert. Denied 363 U.S. 827.

situation of a mixed voyage with its inherent possibility of residual subsidy, without purposeful diversion. The Secretary's order is perfectly consistent with the language in *PFEL* relied on by Matson which broadly condemns "diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator".[15] That language merely reasserts the declared purposes of Section 805(a) to prevent deliberate shuffling of funds from subsidized to unsubsidized operations, and to ultimately provide substantial protection for domestic operators as against subsidized operators. The opinion in *PFEL* never considered, nor does the language embrace the unique mixed service situation specifically provided for in the Act by Sections 506 and 605(a). It never considered the degree or amount of inherent residual subsidy which might remain without disrupting the dual Congressional plan to sustain both the foreign and domestic trades. It directed its attention solely to the rejection of the doctrine of fundamental entitlement and to reaffirming the Congressional intent to prevent deliberate subsidy diversion. The Secretary correctly considered the *PFEL* opinion for what is was worth[16] when applied to "the mixed" voyage situation, and proceeded to adopt the standard of "substantial competitive advantage" as a test of unfair competition when dealing with a residual subsidy benefit to States.

As stated above, the Secretary was faced in this case with the relatively novel situation of a mixed service carrier

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15. Ibid p. 186.

16. The Secretary commented at p. 39: "Again, bearing in mind the factual differences in the *PFEL* situation and in the situation involved in this proceeding, I think that the Court's indication there that competitive advantage from subsidy is a relevant factor in determining whether unfair competition would result from granting an 805(a) application is a relevant factor to the unfair competition issue here." (S.C.D. p. 39).

having a residual subsidy benefit, increasing its domestic service. The factual makeup required the Secretary to define and apply the concept of "unfair competition" within Section 805(a) to a mixed service situation. Lacking any specific or express statutory language as a guide, the Secretary correctly looked to the over all purposes of the Act and the legislative history surrounding it. Putting aside the extreme positions on both sides, the Secretary objectively concluded that the Act was promulgated for the dual purposes of maintaining a highly effective Merchant Marine at all times and places (Section 101) while at the same time protecting the legitimate interests of exclusively domestic operators against the devious assault of subsidy diversion. [Section 805(a)]. Cognizant of these dual objectives and unrestricted by specific statutory mandate or judicial precedent, the Secretary correctly rejected a mechanical test of unfair competition. Rather, having concluded that the Act vested in him a wide range of discretion, the Secretary properly adopted a standard which was flexible enough to implement his discretion but restricted enough to substantially preserve in all cases the obvious protective intent of Section 805(a).[17] This Court, therefore concludes that the standard of "substantial competitive advantage" is the product of sound reason, administrative experience, appreciation of the complexities of the problem and a thorough understanding of the statutory policies, which constitutes an allowable administrative policy judgment undisturbable on judicial review.

Having adopted this new standard of unfair competition under Section 805(a), the Secretary proceeded to find that

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17. The secretary rejected the Board's extreme statement that a finding of unfair competition must be based on evidence that the resulting advantage of the subsidized operator over the domestic operator is "such an overwhelming unconscionable advantage as to constitute 'unfair competition'." (SCD p. 40)

if the application were granted States would not have a substantial competitive advantage over Matson as a result of its residual subsidy benefit. (S.C.D. p.53) Matson has strenuously objected to this finding. This Court having affirmed the Secretary's new standard must only inquire as to whether the Secretary's factual finding was supported by substantial evidence. *Minneapolis & St. Louis R. Co. v. U.S., supra.* The Court need not catalogue here the extensive findings set forth by the Secretary in his Order. (S.C.D. pp.41-53), nor will the Court substitute its judgment for that of the Secretary. It is sufficient to state the Court is satisfied that the record reveals the Secretary reached his conclusions on the basis of substantial relevant and legally admissable evidence.

In determining that States would not gain a substantial competitive advantage over Matson, the Secretary properly took into account the respective roles of Matson and States in the California-Hawaii trade. (S.C.D. p.41). He noted that the over all picture reflected that for many years Matson has been and is the predominant carrier in that trade. He found that Matson had been carrying nearly 1,500,000 tons of cargo annually in each direction in the trade, compared with States' (and its predecessor's) carryings ranging between only 7,926 and 22,430 short tons westbound and considerably less eastbound. He also found that Matson had been making up to 18 round voyages a month contrasted with about one a month by States. Additionally he found that other carriers entered the trade from time to time, but with little or no success against Matson's efficiency and established position. He concluded that Matson for a number of years past had carried about 98% of the cargo between Hawaii and the Pacific Coast, and that currently it was carrying about 95% of the liner cargo in the California-Hawaii trade.

Looking to the future, the Secretary stated that if States' application were granted and its annual calls increased by 13 in each direction, States' carrying in the California-Hawaii trade would increase by an estimated 67,000 tons annually westbound and 26,500 tons annually eastbound. (Ex. 4A, Item 10, pp.1-2). For each sailing by States every two weeks, Matson would have about 14 sailings per month; in a year's time Matson would carry 22 times as much cargo as States. Expressed in percentage, the Secretary noted that the cargo which would be moved by States in the California-Hawaii trade on the additional sailings would be 5% of the total cargo moving in that trade. The Secretary then concluded on the basis of these findings (which were derived from the numerous exhibits and findings of the Board, Hearing Examiner, and Review Examiner): "that Matson has not had substantial competition in the California-Hawaii trade, and that the competitive situation would be changed to some, but not to a great, extent by granting States' application." (S.C.D., p.43). The record clearly reflects that the Secretary's basic conclusion regarding the respective position of the two carriers at the time of the decision and in the future is supported by substantial evidence.[18]

The total impact of States' additional service in relation to Matson's position in the trade is a proper factor to be considered in determining whether unfair competition would result.[19] It is true that under the Secretary's new

18. In its brief Matson quibbles with many of the subsidiary findings listed in the Secretary's decision (Matson Reply Memo pp. 40-41) although admittedly there may be some legitimate disagreement over the actual statistics, the ultimate conclusion that the competitive situation would not be greatly altered is clearly supportable by the record.

19. The Federal Maritime Board had indicated in previous 805(a) cases that carriage by the applicant subsidized operator of only a small percentage of the total cargo movement in the domes-

test a near monopolist such as Matson is not entitled in all circumstances to as much protection from entry of subsidized operators into its waters as a small unsubsidized carrier in a tightly competitive market would have against the same subsidized operator. A slight subsidy benefit in the former case may serve the over all purpose of the Act while barely causing more than a ripple of competitive disadvantage; whereas in the latter case it could disturb the entire ebb and flow of a given market. Nevertheless, this quantitative or relational approach would not always be determinative of the unfair competition issue. For example, if States were permitted to enter the California-Hawaii trade and to use diverted subsidy or residual subsidy to "skim the cream" of the domestic cargo in that trade, unfair competition might result even though a very small percentage of the total cargo were involved. On the other hand even if the amount of additional cargo carried by States in the California-Hawaii trade were held to be substantial that would not be equivalent to a determination that States would have a substantial competitive advantage over Matson *because of residual subsidy.*

The critical question then in resolving the unfair competition issue is not how much cargo States will carry in relation to Matson, but how much cargo it will take away from Matson as a result of its residual subsidy benefit and the eventual impact of this loss upon Matson. The Secretary fully considered the various dollar figures of projected residual subsidy which were submitted to him. He accepted the Hearing Examiners basic finding that States California-Hawaii service would be unprofitable on a full absorption basis (S.C.D. p.52). Matson is correct that the Secretary did

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tic trade is not substantial competition to an exclusively domestic operator therein. States Marine Lines, Inc. Sec. 805(a) Application, 6 F.M.B. 378, 384 (1961), Pacific Transp. Lines, Inc. Sec. 805(a) Application, 4 F.M.B. 146, 148 (1953).

not come to an exact dollar figure of residual subsidy benefit, and that he at times considered all 26 voyages and at other times only the additional 13.[20] Neither of these points however cast doubt on the validity of the Secretary's ultimate conclusion that the residual subsidy benefit would not give States a substantial competitive advantage. The Secretary had before him a wide range of figures which varied according to the method of accounting, the designation of items as fixed costs or doing business and the technique of cost allocation. Faced with a number of acceptable accounting methods he was free to choose the figure which he considered most accurate as long as it was a reasonable figure which accorded with modern accounting practice. Congress did not dictate a single type of accounting technique with elaborate regulations as guidelines to the untangling of complex tax and subsidy allocations. The Court would have accepted any of the figures based on full absorption accounting. However, even if the Court had felt that the $1,200,000 annual figure offered by Matson was the only accurate portrayal of the subsidy residue, the Secretary's conclusion as to unfair competition would still be

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20. The Hearing Examiner ruled and the Board and Secretary affirmed the proposition that the Secretary would only consider the additional 13 voyages for which States sought permission. The Secretary's primary duty was to consider the fairness of competition and the prejudice which might result from the 13 additional sailings. However, the Secretary did not ignore the reality that States already was making 13 calls pursuant to an earlier application. In determining the extent of competition which States would offer, the Secretary did consider the cumulative impact and the incremental effect. (S.C.D. pp. 42-43, 59). There were many other instances throughout the Order in which the Secretary weighed the cumulative effect of the 26 voyages. (S.C.D. pp. 33, 48, 49, 50, 51, 64, 75-77). Accordingly Matson's attempt at handing the spectre of *Brown Shoe Co. v. U.S.*, 370 U.S. 294 over States is futile. The Secretary under the new standard announced in this case—substantial competitive advantage—will necessarily review the over all competitive picture any time that an application for additional authority is submitted.

rational and supported by substantial evidence. For the Secretary pointed out that despite States subsidy crutch certain equalizing forces would operate to abate that advantage considerably. First, he alluded to the normal Statutory and contractual restriction upon the subsidized contractor and, government aid in various forms and in substantial measure to domestic operators. (S.C.D. p.53) Next he noted that the outlook for the California-Hawaii trade is one of growth — and that even by Matson's standards it is expected to continue to grow at a rate of from 1% to 2% each year. Using this projected growth figure coupled with other findings concerning Matson's predominance in the trade as compared with States, the Secretary concluded that Matson would probably within 5 years be carrying as much cargo as it did at the time of States application for 13 additional sailings.

In addition to the above findings which were clearly supportable, the Secretary, within the proper bounds of his discretion, predicted that effective competition would be increased modestly in the trade as a result of granting the application. (S.C.D. p.53) He regarded this prospect as beneficial to the maritime trade and echoed the words of the Court in *PFEL* that "effective competition is not to be equated with unfair competition." To support this finding that effective rather than unfair competition would ensue, the Secretary had before him the conclusions of the Hearing Examiner Board and Review Examiner that States would not compete "fraudulently, in a cutthroat manner, or in a way that is unfair according to accepted generally applicable legal or ethical standards." (S.C.D. p.39) He had good reason, and ample testimony to believe that States would continue to adhere to the dominant carrier principle of following Matson's rates. (Transcript 319, 692-94). Further-

more, the Secretary found that, although States would offer available service for some high profit cargo, there was no basis to conclude that States would (in its increased California-Hawaii service) engage in an extensive "cream-skimming" operation to Matson's detriment. (S.C.D. pp. 60-62). Rather, States would in many cases provide welcome additional service and available sailing dates for West Coast shippers.

As an added protection and because the consequences of granting the application could not be determined with any degree of certainty, the Secretary provided in his order for an approriate and expeditious review of all 26 States voyages at the end of a three year period. In the meantime the Secretary's conclusion must stand as it is amply supported by substantial evidence.

The Court also upholds without hesitation the Secretary's finding under Section 805(a) that the granting of the application would not do prejudice to the objects and policies of the Act. The wording of this requirement by its very nature confers the widest range of discretion upon the Secretary. Furthermore, although Matson has raised some serious questions concerning the Secretary's adoption of a new standard and his application of that standard to the unfair competition issue, its attempt to overturn the Secretary's conclusion on this issue is basically a last ditch attempt to revert to the obsolete doctrine of fundamental entitlement.

The thrust of the Secretary's conclusion is simply that the California-Hawaii trade will grow enough to accommodate both Matson as the predominant carrier and States the supplemental carrier. He found no reason to accept Matson's dour prediction that a direct repercussion of States additional service would be an increase of rates and curtailment of service by Matson. The evidence pointed to the greater likelihood of a decrease in rates. He had previ-

ously rejected the accusation that States would confine itself to "cream skimming" operations.[21] He further concluded that he could deal with any ensuing inadequacy in States Far East service if that situation should appear. In aggregate, the protesting carrier Matson was resorting to raising every possible detrimental effect which *might* follow a grant of 13 additional calls to States. The Secretary had substantial evidence to reach contrary conclusions. However, if the future developments in the trade proved him incorrect, the Secretary added the built-in provision for expeditious review within a three year period of all 26 voyages.

On the other hand, the Secretary foresaw considerable benefits to the objects and policies of the Act as a result of States additional entry into the domestic trade. Although it is true that Matson's carrier service is on the whole adequate to meet the needs of most Hawaiian shippers, it is undisputed that there exists a definite need for better service westbound in some types of cargo[22] (e.g. auto dealers, household goods, fruit products, Transcript 878, 1119,

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21. The Secretary found that it would be "reasonable to expect that with more frequent sailings shippers of general cargo would increasingly ship with States, and that its cargo mix would have a lower proportion than it now has of the enumerated high net revenue, more easily handled items." (S.C.D. p. 61). States as a common carrier would be obliged to accept any cargo offered to it. Thus with time States would be picking up the slack in service with a mixed cargo rather than "skimming the cream."

22. The Hearing Examiner noted that shippers of used automobiles had on occasion been unable to get space on Matson's vessels when they wanted it, although Matson had done much to alleviate that situation. (S.C.D. p. 64). The Board also referred to the unusually high utilization of Matson's capacity and complaints indicating that Matson's services do not fully meet the needs of many shippers. These findings all accord with the Secretary's determination that Matson ran a "tight service" and in view of the predicted growth in the trade, the public interest in general and westcoast shippers in particular would be greatly benefited by States additional service.

3568). Additionally the intervenor defendant, Port of San Diego, testified that San Diego badly needed service to Hawaii which Matson did not provide. Both the Board and the Secretary found that permitting States to engage additionally in the California-Hawaii trade would not only furnish needed service to San Diego but would aid in meeting national defense requirements in facilitating the movements of military cargo from an important military base to outlying defense areas in the mid-Pacific and the Far East. (S.C.D. p. 67)

There is no doubt that Matson may suffer some temporary financial loss as a result of States additional service in the California-Hawaii trade. But throughout the Secretary's order is the firm belief supported by evidence that temporary setbacks can be rectified by growth in the trade and more effective service. In the meantime a healthy dose of competition would be injected into the trade and the public interest will be better served. The unhealthy dependence of some shippers on Matson would be reduced. States additional service would remedy the tightness of Matson's closely run service and provide more adequate service to west coast shippers. If the increased competition results in a lowering of rates the public, including Hawaii, will benefit to a considerable degree. If the predicted growth in trade does materialize facilities will be available to accommodate the needs of increased cargo demands. The over all loosening of a near monopolist's grip on the State of Hawaii is fully in accord with the antitrust policy of this country. In weighing prejudice to the objects and policies of the Act, the Secretary was fully cognizant that what may be bad for Matson is not necessarily bad for the country and its merchant marine. *Pacific Far East Lines, Inc. v. Federal Maritime Board, supra,* p. 186.

There is no cause for unsubsidized shippers to panic in fear of a sudden intrusion into their trade areas by subsidized operators. The Secretary was dealing with a specific situation in which possible benefits to the trade greatly outweighed the potential harm of a limited amount of subsidy residue. Unsubsidized operators will still receive substantial protection from Section 805(a). Permission to enter the domestic trade by a mixed service operator will only be granted as a final resort when adequate service by unsubsidized operators is unavailable. Therefore, it is the opinion of this Court that the dual purpose of the Merchant Marine Act to develop and protect both the foreign and domestic water-borne commerce is not only kept intact but is actually promoted by the Secretary's decision in this case.

In accordance with the above,[23] Matson's motion for summary judgment is DENIED, the cross motion for summary judgment by the intervenor defendants is GRANTED, and the Secretary's Order granting the application of States is hereby AFFIRMED.

Dated: August 10, 1966

ALBERT C. WOLLENBERG
United States District Judge

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23. The Secretary was free to discard administrative precedents as long as he fully explained the basis of his decision. The Secretary's Opinion can only be praised for its clarity, documentation and thoroughness. Since the Court believes that the Secretary's findings and analysis are more than adequate to support his decision, it is not necessary to discuss the other procedural objections offered by Matson.

Appendix C

DEPARTMENT OF COMMERCE
Office of the Secretary

MARITIME SUBSIDY BOARD DOCKET S-121

STATES STEAMSHIP COMPANY —
APPLICATION TO CALL AT HAWAII

OPINION AND ORDER OF THE SECRETARY OF COMMERCE

I

This proceeding is before the Secretary of Commerce in accordance with Department of Commerce Order No. 117 (Revised) for review of a decision by the Maritime Subsidy Board granting an application of the States Steamship Company for permission to increase its intermediate calls at Hawaii in connection with its California/Far East service.

In January, 1961, States Steamship Company (States) filed with the Federal Maritime Board[1] an application for permission under section 805(a) of the Merchant Marine Act, 1936, (Act) as amended, to increase its intermediate service between California and Hawaii from 13 to 26 calls per year in each direction on the sailings of its subsidized ships on Trade Route 29, between California and the Far East.

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1. By authority of Reorganization Plan No. 7 of 1961, effective August 12, 1961, the Maritime Subsidy Board succeeded the Federal Maritime Board as to jurisdiction over the States Application herein.

The Harbor Commission of the City of San Diego[2] intervened in behalf of the applicant; Matson Navigation Company (Matson) and the State of Hawaii (Hawaii) intervened in opposition. Public counsel of the Maritime Administration also took a position in opposition to the application.

In March, 1963, the Hearing Examiner served his Recommended Decision, concluding that to grant States' application under 805(a) would result in unfair competition to Matson and be prejudicial to the objects and policy of the Act, except that States should be permitted (a) to serve San Diego, California, 26 times a year in each direction, and (b) to lift cargo in California for discharge in Hawaii (but not cargo in Hawaii for discharge in California) to the extent of 26 calls a year, whenever Matson, upon two weeks prior request therefor, informs the shipper within 24 hours after such request that it is unable to transport cargo offered to it for specific sailings.

All parties, including Public Counsel, filed exceptions to the Recommended Decision. The Maritime Subsidy Board took the decision under review, and in a Final Opinion and Order, decided October 7, 1963, and served November 27, 1963, the Board rejected the Recommended Decision and granted the requested permission. The Board's decision was based on conclusions that a subsidized operator is not excused by sections 506 and 605(a) of the Act from obtaining section 805(a) written permission; that Matson operates exclusively in the coastwise or intercoastal service within the meaning of 805(a); and that granting the pro-

2. Subsequent to this intervention, the Harbor Commission of the Port of San Diego was replaced by the Port of San Diego Unified Port District. The latter, rather than the former, public agency is now a party to this proceeding and is referred to hereinafter as "San Diego".

posed service would not, under the terms of 805(a), result in unfair competition to any domestic operator nor be prejudicial to the objects and policy of the Act.

Petitions for review, from Matson and Hawaii, and replies from States and San Diego asking that review not be granted were filed with the Secretary of Commerce, who, on January 6, 1964, decided to stay the Board's action and to review the Board's Opinion and Order. On April 23, 1964, the Secretary, in an Opinion and Order holding that section 805(a) is applicable in this case so that States must obtain written permission to increase its calls at Hawaii as proposed, reversed the Board, finding that to grant the application would, under the terms of 805(a), be prejudicial to the objects and policy of the Act. The Secretary, however, authorized States to carry cargo from California to Hawaii up to 26 voyages a year on condition that the right of refusal upon two weeks notice be given to the unsubsidized operators in the trade.

In June, 1964, States filed in the U. S. District Court for the District of Columbia a civil action requesting the Court to review and set aside the Secretary's Opinion and Order. The Secretary, and intervenors Matson, Hawaii, and San Diego, filed answers to the complaint. All parties filed motions for summary judgment.

In December, 1964, the Secretary filed with the Court a motion for remand of the proceeding, so that he could set aside his April 23, 1964, decision and set up a procedure for further review of the case, including the designation of a Review Examiner to assist in the review and to report recommendations to the Secretary, following which a final administrative disposition of the case would be made. A stipulation by all parties in the case, concurring in the motion to remand, was filed with the Court. The Court entered an order for remand and in January 1965, the Sec-

retary by order set aside his earlier decision and set the matter for further Secretarial review.

The Secretary by letter of January 14, 1965, appointed a Review Examiner, gave him a set of instructions, and requested that he submit his recommendations to the Secretary of Commerce within 60 days. On March 1, 1965, the Review Examiner served his Recommended Decision. The Review Examiner concluded that written permission under section 805(a) is *not* required where a subsidized operator in foreign trade wishes to make intermediate calls at Hawaii on subsidized voyages, because sections 605(a) and 506 grant express permission for such mixed voyages and provide protection for exclusively domestic carriers through pro-rata reduction and refund of subsidy for the domestic portion of the mixed voyage. However, he also concluded that, even if 805(a) applies so as to require written permission, the proposed increased calls by States would not result in unfair competition or be prejudicial to the objects and policy of the Act. His recommendation was to remand the proceeding to the Board with directions that it enter an order to revise States' subsidy contracts so as to eliminate any limits on the trading areas based on 805(a).

Exceptions to the Review Examiner's recommended decision, and briefs in support of such exceptions, were filed with the Secretary by Matson and Hawaii. Also, a brief was filed in behalf of American Union Transport, Inc., (AUT) and Isthmian Lines, Inc., (Isthmian) as *amici curiae,* addressed to the question whether, as a matter of law, the section 805(a) written permission requirement applies to subsidized vessels operating in the domestic trade pursuant to sections 506 and 605(a) of the Act. These amici parties took the position that the 805(a) written permission requirement is applicable. States filed a reply brief, and San

Diego filed a letter of reply, to the foregoing exceptions and briefs. On April 29, 1965, oral argument in behalf of Matson, Hawaii, AUT-Isthmian, States, and San Diego was held before the Secretary.

The case is now before the Secretary of Commerce for decision, against a background of four previous decisions at various administrative levels, two of which approved States' application and two of which denied the application.

The issues to be decided are:

a. Does section 805(a) of the Act require States to obtain written permission in order to engage, as proposed, in the domestic trade and, at the same time, receive operating-differential subsidy?

b. If the answer to the above issue is "yes," does Matson operate exclusively in the domestic service so as to be entitled to protection under 805(a) against the grant of an application that would result in unfair competition to such an operator?

c. If the answers to the above issues are "yes," would approval of States' application result in unfair competition to Matson, within the meaning of section 805(a)?

d. If the answer to the issue stated first above is "yes," would approval of States' application be prejudicial to the objects and policy of the Act within the meaning of section 805(a)?

II

THE APPLICABILITY OF SECTION 805(a)

States contends that section 805(a) permission is not required in this case. The Board disagreed, but the Review Examiner agreed, with this contention. The basis asserted for the contention that section 805(a) permission is not required is that sections 506 and 605(a) in effect authorize subsidized service in certain mixed foreign and domestic

voyages specified in those sections, including a voyage in a foreign trade in which the vessel stops at Hawaii, and by statutory construction, therefore, section 805(a) cannot apply.

For the reasons hereafter stated, I conclude that States is required by section 805(a) to obtain written permission in order to increase its domestic calls at Hawaii and at the same time continue to receive operating differential subsidy.

(a) Express language of the statute.

The relevant portion of 805(a) reads as follows:

> "It shall be unlawful to . . . pay any subsidy to any contractor under authority of title VI of this Act . . . if said contractor . . . directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service . . . without the written permission of the Commission [now Secretary of Commerce]. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the [Secretary] shall give a hearing. . . . The [Secretary] shall not grant any such application if [he] finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act. . . ."

It seems quite clear that the express, mandatory, and all-inclusive terms of 805(a) provide that the Secretary may not, without exception, pay *any* operating differential subsidy (ODS) to any contractor who operates any vessel engaged in domestic intercoastal or coastwise service *without written permission.*

Accepted rules of statutory construction call for the conclusion that the requirements of 805(a) do apply to the States' application. The plain meaning of a statute must

be adopted;[1] its clear meaning is not to be departed from.[2] It is unnecessary to look beyond clear and unambiguous statutory language; a statute means what it plainly expresses.[3] When a statute's language is clear, resort need not be made to legislative history.

> "There is no need to refer to the legislative history where the statutory language is clear. 'The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.' Gemsco v. Walling, 324 U.S. 244, 260 (1945). This canon of construction has received consistent adherence in our decisions [citing cases]."[4]

The argument is made, however, that these aforementioned rules of statutory construction do not apply to 805(a) on the facts of this case because to apply 805(a) literally here would bring it into conflict with other sections of the Act of which it is a part, contrary to the rule of statutory construction that various sections of an act are to be construed so as to give harmony to the whole. In this connection, the Review Examiner pointed to what he conceived to be several inconsistencies in or between 805(a), 506 and 605(a) if these sections are construed to cover the same vessels and services. This in turn led him to seek an interpretation of 805(a) that would be, in his view, consistent

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1. Jay v. Boyd, 351 U.S. 345, 357 (1956).

2. United States v. Sullivan, 332 U.S. 689, 693 (1948). See also Bouie v. City of Columbia, 378 U.S. 347, 362-63 (1964).

3. Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 64 (1953); Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944); Helvering v. Hammel, 311 U.S. 504, 511 (1941); Hilliard v. United States, 310 F. 2d 631, 632 (6th Cir. 1962); American Community Builders, Inc. v. Com'r. of Internal Revenue, 301 F. 2d 7.13 (7th Cir. 1962).

4. Ex Parte Collett, 337 U.S. 55,61 (1949).

with 506 and 605(a). His solution was to conclude in this case, as urged by States, that section 805(a) does not apply to subsidized vessels proposed for operation in certain domestic trades (in this case, the California/Hawaii trade) by means of intermediate calls on voyages in the foreign trade, but that 805(a) applies only to the separate domestic operation of *unsubsidized* vessels owned or controlled by an operator who also has at the same time *other* vessels which are subsidized in the U. S. foreign trade. Further, the Review Examiner concluded that sections 506 and 605(a) only are applicable to the proposed use of *subsidized* vessels in the "domestic" trade, and that the proration formulae of these two sections are in effect self-operative and do not depend on a prior 805(a) written permission.

I have given careful consideration to what the Review Examiner has described as "patent inconsistencies" in these sections of the statute and am not persuaded that his analysis is correct. Section 805(a) states that it is unlawful to pay subsidy to any contractor who operates "any" vessel in the domestic intercoastal or coastwise trade, "without written permission" of the Commission (now Secretary of Commerce). I interpret section 805(a) to mean what it says, that is, a subsidized operator should get written permission to operate *any* vessel, subsidized or unsubsidized, in the domestic trade — otherwise, he may not continue to receive subsidy payments. Then, if 805(a) written permission is given as to *subsidized* vessels, the proration formulae of sections 506 and 605(a) obviously are to be applied. Of course, 805(a) permission can only be given as to subsidized vessels where the proposed calls would not be precluded by the terms of 506 and 605(a). On the other hand, if unsubsidized vessels only are covered by a given 805(a) written permission, the proration formulae of sections 506 and 605(a) are, of course, not relevant.

(b) Legislative history.

Because of conflicts between sections of the Act that he thought would result if 805(a) is interpreted to apply to subsidized vessels operated in a mixed service by a subsidized carrier the Review Examiner resorted to legislative history. As stated above, I do not see such ambiguity on the face of the statute as to call for resort to legislative history, and therefore conclude on the basis of authority previously cited that it is not necessary to look further than the clear, express language of the statute. Nevertheless, I have examined the pertinent legislative history to see if it supports the interpretation of section 805(a) which is urged by States and recommended by the Review Examiner.

It is true, as the Review Examiner points out, that in the Congressional committee hearings domestic operators voiced concern about subsidized carriers operating vessels in the domestic trade. But they were concerned both with subsidized and unsubsidized vessels and voyages in such trade on the part of operators receiving subsidy. It is also true that sections 506 and 605(a) have to do with subsidized vessels. But it does not at all follow that Congress must therefore have intended 805(a) to apply only to unsubsidized vessels of operators receiving subsidy. The Review Examiner in effect reasons that Congress, seeing a threat to the unsubsidized carrier from operators receiving subsidy, compartmentalized the Act so as to provide in 506 and 605(a) for the case of subsidized operators competing by the use of subsidized vessels, and in 805(a) for the case of subsidized operators competing by the use of unsubsidized vessels. He thus refers to the respective sections as having a dichotomy of purposes, 506 and 605(a) on the one hand and 805(a) on the other providing a "separate solution" for a "separate problem."

My own review of the legislative history does not lead me to conclude that such a dichotomy of purposes resulted in Congress enacting 805(a) as a means of getting at only the "problem" of a subsidized carrier operating unsubsidized vessels in a domestic trade. The only basis in legislative history that I find for a conclusion that anyone at the time the legislation was being proposed construed the 805(a) provision as intended to be so restrictive lies in an exchange, during Senate Committee hearings in 1936 on S. 3500, between a Mr. J. S. Peacock, Director of the Shipping Board Bureau, and Senator Bachman.[1]

This exchange is ambiguous. It could mean, as States and the Review Examiner say, that Mr. Peacock construed the permission requirement as being applicable only to subsidized operators who wish to operate a separate, unsubsidized intercoastal service. (If so, the exchange indicates that the Senator did not so construe it.)[2] On the other hand,

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1. "Senator Bachman. Colonel, what is the reason for any subsidy for a strictly coastwise trade? It does not come into competition with foreign trade.

"Mr. Peacock. There is no reason other than the possible building of ships, and this bill does not provide any subsidy for strictly coastwise trade.

"Senator Bachman. But the Authority is given permission to grant it.

"Mr. Peacock. No. The permission here, if I recall rightly simply refers to permitting a subsidized foreign operator also to operate separately and independently in intercoastal service, not a subsidized intercoastal service.

"Senator Bachman. I did not so construe it." (Senate Hearings on S. 3500, 74th Cong., 2d Sess., page 88 (March 1936)).

2. The only other reference cited that may support the view of States and the Review Examiner in this respect, that at the time the 1936 Act was enacted 805(a) was regarded as applying only to unsubsidized vessels operated by subsidized carriers in a domestic trade, is to the book, Nicolson, *The Maritime Subsidies* (1937), excerpts from which appear in States' "Study of the Legislative History" an appendix to its opening brief before the Hearing Examiner. Mr. Nicolson's views, while of interest, are not, of course, a part of the Act's legislative history.

Mr. Peacock's statement could be interpreted, as Matson interprets it, as not addressed to the question of authority to grant permission as to a mixed foreign and domestic trade, but as stating the conclusion merely that subsidy could not, under 805(a) be granted "for a strictly coastwise trade" (because of the prohibition in 605(a)) but that permission could be granted only "to operate separately and independently in intercoastal service."

Interpreting 805(a), as well as 506 and 605(a), as applying to subsidized vessels of a subsidized carrier on a mixed domestic and foreign voyage, does not mean that Congress unnecessarily wrote 805(a) to take care of a situation for which it had already provided in the other sections. Sections 506 and 605(a) generally prohibit the payment of subsidy as to vessels on a voyage on which they engage in domestic trade, except that subsidy is permitted as to voyages in the mixed foreign and domestic trades specified therein upon payback and reduction of subsidy according to the formulae provided therein. This of course provides a significant amount of protection to unsubsidized domestic operators. However, early drafts of the 1936 Act containing 506/605(a) type provisions resulted in protests by domestic operators on the ground of probable unfair advantages a subsidized operator would have in the mixed trades despite such protection. In subsequent versions of the Act, as an additional protection to unsubsidized domestic operators with regard to operation of subsidized vessels in mixed voyages, it was first provided that subsidy would be reduced while such a vessel was being operated with the "consent" of the agency, and in a later forerunner to 605(a) that subsidy would not be paid as to such a vessel without express permission having been given the agency after application and hearings.

It is true that the permission requirement was moved from 605(a) to 805(a) before passage of the Act, but legislative history does not indicate any change in Congress' purpose to provide both kinds of safeguards for the unsubsidized domestic operator with regard to subsidized carriers operating subsidized vessels in the mixed trades. Read as a whole, the Act retained both kinds of protections, and it may be assumed that Congress felt it unnecessary to state the basic permission requirement more than once in the Act, *i.e.*, in 805(a).

I agree with the Maritime Subsidy Board that Congress must have intended for 805(a) to provide controls with regard to mixed 506/605(a) voyages by subsidized operators for the protection of domestic operators in addition to the subsidy repayment and abatement provisions of 506 and 605(a). My review of legislative history does not lead me to any other conclusion than that 805(a) was intended to be applicable to a factual situation such as presented by this case.

To agree with the Review Examiner on the other hand would require, to use the words of the Supreme Court, "strained processes of deduction from events of wholly ambiguous significance" furnishing "dubious bases for inference in every direction."[1]

(c) "Pragmatic considerations."

The Review Examiner in arriving at his construction of 805(a) also applied what he termed "pragmatic considerations that can be deemed to have influenced Congress." As precedents for using this procedure as a means of statutory construction, he cited *United States v. American Trucking Association,* 310 U.S. 534, 543 (1940); and *United States*

1. Ex Parte Collett, 337 U.S. 55, 61 (1949), quoting Gemsco v. Walling, 324 U.S. 244,260 (1945).

v. National Marine Engineers' Beneficial Association, 294 F. 2d 385 (2d Cir. 1961). These cases hold that, while there is no more persuasive evidence of a statute's purpose than its words and while the plain meaning of those words is normally followed, such plain meaning is not followed when to do so would lead to absurd or futile results or to unreasonable results plainly at variance with the policy of the legislation as a whole.

The over-all policy of the Merchant Marine Act of 1936, set forth in sections 101 and 210 of the Act, is to foster the development and encourage the maintenance of an adequate and well-balanced merchant marine sufficient to carry the water-borne domestic commerce and a substantial portion of the water-borne foreign commerce of the United States.

Following the plain meaning of the express wording of 805(a) as it is noted above, has not led, nor in my view will lead, to "absurd" results or to "futile" results or to "unreasonable results plainly at variance" with the policy of the Act. To the contrary, the express wording of section 805(a) gives effect to the Congressional purpose of promoting an adequate and well-balanced American merchant marine, for both foreign and domestic commerce. That part of the merchant marine that is subsidized in foreign commerce under the Act is assisted by the subsidy in meeting the competition of lower-cost foreign operators. At the same time, procedures are established in 605(a) and 506 and in 805(a) to assure that such subsidy is not used unfairly against that part of the merchant marine engaged exclusively in domestic trade, which, because foreign flag operators are excluded from the domestic trade, receive no subsidy.

Thus section 605(a) generally prohibits payment of ODS on a vessel on a voyage in which it engages in domestic trade; and, while specifying that such subsidy "may be

paid" on voyages in four enumerated mixed foreign and domestic trades, it requires subsidy reduction on such voyages according to a stated formula. And section 506 provides as to a vessel on which construction subsidy has been paid, for subsidy repayment according to a stated formula when that vessel is used in one of the enumerated mixed trades.

Since the Secretary is authorized to pay subsidy to vessels on voyages in certain mixed trades, this indicates a Congressional attitude that it may be in the public interest for subsidized carriers, under certain conditions, to operate in the domestic segments of such trades. The application of section 805(a) to proposals of subsidized carriers to serve these mixed trades with subsidized vessels gives an added protection to the unsubsidized carriers operating in the domestic segments of such mixed trades. Thereby, Congress has forbidden the Secretary to pay ODS to a carrier operating in the domestic trade without the Secretary's written permission, has provided for a hearing on applications therefor with intervention by interested persons, and has prohibited grant of such an application if the Secretary finds it would result in unfair competition to exclusively domestic operators or would be prejudicial to the objects and policy of the Act.

Thus the Congress in an effort to achieve an adequate, well-balanced American merchant marine through the subsidy program of the Act sought both to promote the foreign commerce segment and also to encourage the maintenance of the domestic commerce segment of the merchant marine.

The application of this interpretation of 805(a) does not, of course, result automatically in prohibiting subsidized vessels from serving domestic segments of mixed voyages specified in 605(a). States and other subsidized carriers have in the past been permitted to furnish such service.

Adopting the interpretation of 805(a) recommended by the Review Examiner—that the 805(a) requirements apply to an ODS contractor's unsubsidized, but not subsidized, vessels in a domestic service—would lead to results that I believe would indeed be "unreasonable" and "plainly at variance" with the policy of the Act. I mention only two examples at this point. Applying this interpretation, unsubsidized carriers in a domestic trade would receive *less* protection from *subsidized* vessels of ODS contractors than from unsubsidized vessels of ODS contractors operating in that trade, because 805(a) would require written permission only as to unsubsidized vessels. Also under this interpretation the Secretary, while retaining significant controls (e.g., maximum and minimum sailings and ports of call) over subsidized carriers' foreign operations, would lose a significant kind of control that he has been thought to have and that he has been exercising over such carriers' domestic operations with subsidized vessels. This in turn could well result in a concentration by such carriers of subsidized vessels in the domestic portion of a mixed trade and comparatively less attention to the foreign trade in which the carrier is subsidized to compete, thereby thwarting the efforts of the Secretary to promote, through administration of the subsidy program of the Act, the Nation's foreign commerce by ocean transportation.

(d) Administrative construction.

The long-standing administrative interpretation of the 1936 Act by the Maritime Administration and its predecessors, supporting the express language of 805(a), has been that written permission under that section is required in order for a subsidized carrier to operate any voyage in a domestic service, including the mixed foreign and domestic trades specified in 506 and 605(a) and, at the same

time, receive ODS.[1] The Review Examiner recognized that "Predecessors of the Board required that permission be obtained under section 805(a) in circumstances such as those involved in this case."

In 1955 a formal rule-making proceeding was instituted by the Maritime Administrator/Board to review that interpretation of 805(a).[2] On the basis thereof, and after considering comments filed (including a brief submitted by States which supported the proposition that 805(a) applied to mixed voyages enumerated in 605(a)), the Administrator/Board concluded that written permission under 805(a) was required for the mixed voyages specified in 605(a).[3]

And, of course, not only the Subsidy Board's predecessors but the Board itself has followed this interpretation of 805(a) applicability in the instant case and in others.[4]

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1. Examples: Lykes Bros. Steamship Co., Inc., Docket S-9, 3 U.S.M.C. 349 (1947); American President Lines, Inc., Docket S-25, 3 F.M.B. 553 (1951); Pacific Transport Lines, Inc., Docket S-18, 4 F.M.B. 7 (1952); Pacific Transport Lines, Inc., Docket S-18 (Sub. No. 1), 4 F.M.B. 146 (1953); American President Lines, Inc., Docket S-17 (Sub. No. 1) and S-33, 4 F.M.B.-MA 488 (1954); States Steamship Co., Docket S-128, 1 SRR (Pike & Fischer) 599 (MSB 1961).

2. The published notice of rule-making stated that it concerned whether written permission was required under 805(a) for "the activities and relationships described therein [in 805(a)] related to voyages described in Section 605(a) of said Act." 20 Fed. Reg. 8050 (1955), American President Lines, Ltd.—Proposed Rule Making, Docket S-59.

3. Maritime Commission Minutes, November 17, 1959, page 56015.

4. States Steamship Co.—Hawaiian Outbound Calls, Docket S-128, 1 SRR (Pike & Fischer) 599 (MSB 1961); Grace Line, Inc., American Export Line, Inc., U.S. Atlantic-Puerto Rico Service, Dockets S-140 and S-141, 2 SRR (Pike & Fischer) 1101 (1963). States and its predecessor in interest in the Hawaiian domestic trade, Pacific Transport Lines, both before and after the 1955 rule-making proceeding, filed and received 805(a) permission in this trade. States Steamship Co.—Hawaii Outbound Calls, *supra;* Pacific Transport Lines, Inc., Section 805(a) Application, 4 F.M.B. 146 (1953).

This long-standing administrative interpretation of 805(a) is entitled to great weight in any event. And this would be so even if the meaning of 805(a) were not clear, under the rule of statutory construction that where a contemporaneous and practical interpretation by those administering a statute stands for a considerable length of time that interpretation is to be accorded great weight in ascertaining the meaning of doubtful statutory language.[1]

It is also impressive in this connection that, in the face of the well-known, long-standing administrative interpretation of 805(a) described above, Congress has not changed the 805(a) provisions here in question although, in the course of amending the Act more than a hundred times over the years, Congress has reviewed extensively the subsidy program a number of times.[2] It is clear that Congress has accepted the administrative construction as the correct one. A contemporaneous, long-standing, consistent interpretation of a statute is entitled to even more weight where the statute in question has repeatedly been before Congress, and especially where Congress has re-enacted or amended

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1. Great Northern R. Co. v. United States, 315 U.S. 262 (1942); Johnson v. Britton, 290 F. 2d 355 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 859 (1961); Savoid v. District of Columbia, 288 F. 2d 851 (D.C. Cir. 1961). Contemporaneous interpretations of such periods of time as 5, 9, 10, 18, and 20 years have been taken as governing statutory meaning. Sutherland, *Statutes and Statutory Construction* (3d ed. 1943) § 5107.

2. See, *e.g.*, Hearings before the Subcommittee on Maritime Affairs of the House Committee on Merchant Marine and Fisheries, Amending the Merchant Marine Act, 1936, 81st Cong., 1st Sess. (1949); Proposed Amendments to the 1936 Merchant Marine Act, 83d. Cong., 1st Sess. (1953); Study of the Operations of the Maritime Administration and the Federal Maritime Board, 84th Cong., 1st Sess. (1955); Current Merchant Marine Problems, 85th Cong., 1st Sess. (1957).

it without making changes that would nullify such interpretation.[1]

(e) Contractual Application.

Every operator receiving ODS, including States, is a party to an ODS contract with the United States, which contract provides in part that the contractor must obtain 805(a) permission in order to operate any vessel in the coastwise or intercoastal service.[2] I take notice of the fact that similar restrictive provisions have been a part of ODS contracts since 1937. This provision reflects a long-standing procedure of the Maritime Administration and its predeces-

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1. National Labor Relations Board v. Gullett Gin Co., 340 U.S. 361 (1951); United States v. Stowe-Woodward, Inc., 306 F. 2d 678 (1st Cir. 1962), *cert. denied*, 371 U.S. 949 (1963). See also, Power Reactor Development Co. v. International Union of Electrical, Radio, and Machine Workers, AFL-CIO, 367 U.S. 396 (1961); Empire State Highway Transportation Association v. Federal Maritime Board, 291 F. 2d 336 (D.C. Cir. 1961).

2. "II-15. *Coastwise or Intercoastal Service.* Neither the Operator, nor any holding company, subsidiary, affiliate, or associate of the Operator, nor any officer, director, agent or executive thereof shall, without the permission of the United States granted pursuant to Section 805(a) of the Act, directly or indirectly, own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service; Provided that, if such permission is or has been granted none of the persons mentioned in this Article shall divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign trade operation, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; Provided, further, that where such permission is or has been granted pursuant to the Proviso clause of the first paragraph of Section 805(a) of the Act, in the event of substantial change in the character or extent of such operations over those conducted during 1935, the foregoing permission to continue such operations may be limited or terminated by the United States, after notice to the Operator and opportunity for hearing, with respect to any or all of the operations thus permitted."

Article II-15, Operating Differential Subsidy Contract Between States Steamship Company and the United States. (Control No. FMB-62)

sor agencies, has been agreed to by all ODS operators, including States, and is itself good evidence of a contemporaneous, practical, and well-established interpretation of 805(a) as applicable to proposals by subsidized operators to employ subsidized vessels, while continuing to receive ODS thereon, in a domestic service.

In addition to the provision common to all ODS contracts, referred to above, States' ODS contract with the United States further provides that "Service A, B, and C vessels calling in the Hawaiian Islands shall only load and/discharge cargo to and from ports in the Far East except pursuant to written permission granted under Sec. 805(a) of the Act...." Article I-2 (f)(4)(a).

Therefore, even if the Review Examiner's interpretation of 805(a) were accepted, States has committed itself by specific provisions of an existing contract to obtain written permission under 805(a) before operating in the domestic trade, and I do not think it follows as a matter of law, as suggested in States' Motion for Summary Judgment (p. 4) in the District Court proceeding that the contract provision as such is not enforceable.

III

MATSON AS AN EXCLUSIVELY DOMESTIC OPERATOR

Under section 805(a), an application may not be granted if it is found that "it will result in unfair competition to any person, firm, or corporation *operating exclusively in the coastwise or intercoastal service. . . .*" (Emphasis added). Matson intervened after States' application was filed, contending in part that to grant the application would result in unfair competition to it as a corporation operating exclusively in the domestic service. Before proceeding to the

question of whether granting States' application would result in unfair competition to Matson so as to require a denial of the application, a determination must be made as to whether Matson qualified for 805(a) protection against unfair competition as a carrier "operating exclusively in the coastwise or intercoastal service."[1]

States, San Diego, and Hawaii have taken the position that Matson is not a corporation so operating. Matson, and the Public Counsel of the Maritime Administration in the proceedings below, have taken the contrary position.

The answer to this issue depends on the significance of the facts that a subsidiary of Matson's is a subsidized operator in a mixed foreign and domestic service and that Matson itself carried on certain non-domestic operations until February 1961.

The Hearing Examiner found that Oceanic Steamship Company (Oceanic), a subsidized operator on Trade Route 27 (West Coast United States/Australia-New Zealand), is a wholly-owned subsidiary of Matson; the officers of the companies are the same; Matson is Oceanic's managing agent; Oceanic's financial statements are included in Matson's annual reports; Matson files a consolidated tax return for both Matson and Oceanic; Oceanic has not declared or paid dividends to Matson but is accumulating a surplus which could be paid to Matson and which is building up Oceanic's net worth; the name "Matson" is identified in all

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1. Since under 805(a) the Secretary may not grant an application if he finds either that it will result in unfair competition to a person operating exclusively in the domestic service "or that it would be prejudicial to the objects and policy of this Act," it may be noted that, even if it were concluded that Matson is not operating exclusively in the domestic service for the purposes of this case and therefore without standing to claim protection under 805(a) against unfair competition, the question of whether granting States application would be prejudicial to the objects and policy of the Act would remain.

advertising of Oceanic's services; and Oceanic vessels make intermediate calls at Hawaii for domestic cargo and passengers. The Hearing Examiner also found that Matson, at the time States' application was filed had been making calls at British Columbia in connection with Matson's Pacific Northwest/Hawaii service, which calls Matson ceased, for operational and financial reasons, within a month after the filing of States' application.

On the basis of Board precedents, the Hearing Examiner in effect held that the above facts did not prevent Matson from having the status of a corporation operating exclusively in the domestic service, but indicated that in the absence of such precedents he would have concluded to the contrary because of the Matson-Oceanic relationship. The Board held that "for the purposes of this proceeding" Matson is an exclusively domestic operator entitled to the hearing-procedure protection afforded by 805(a). Because of conclusions reached on other issues, the Review Examiner concluded that it was unnecessary to decide this particular question, although he observed that States' argument on it appeared to have considerable merit.

After consideration of the facts recited above, the decision of the Board on the point, and the arguments in the briefs of the parties, I have determined that the Board correctly concluded that Matson operates "exclusively in the coastwise or intercoastal service."

I reach this determination on the facts concerning Matson's operations as of the date of States' 805(a) application on February 2, 1961, including the fact that at that time Matson, in connection with its Pacific Northwest/Hawaii service, had been making calls at British Columbia. Matson's status for purposes of this proceeding with regard to the question at hand is not changed, in my judgment,

because at a later date in February, 1961, it ceased making the British Columbia calls, has not made any such calls since, and has stated that it does not expect to make such calls in the future. The Hearing Examiner found that Matson discontinued the British Columbia calls for "operational and financial reasons," and nothing in the record has come to my attention that would cause me to believe that Matson was motivated to discontinue those calls by a desire to place itself in a better position to claim as an intervener in this proceeding the status of an exclusively domestic operator. However, I concur in the following statement of principle by the Federal Maritime Board in an earlier decision and do not believe that the facts of this case warrant a departure therefrom: "Voyages prior to the filing of an application must be considered as the basis for determination of exclusively domestic status; otherwise an intervener could gain such status merely by announcing that in the future he would confine his operations to domestic ports. . . ."[1]

Does the fact of Matson's British Columbia calls prevent it from qualifying as a person "operating exclusively in the coastwise or domestic service"? The Federal Maritime Board in a previous decision concluded that, while these calls precluded a finding in that case that Matson operated exclusively in the domestic service so far as its Northwest/Hawaii service was concerned, "[i]n its service between California and Hawaii it clearly operates 'exclusively' in the domestic service."[2] That conclusion is consistent with the administrative interpretation that has uni-

1. Waterman Steamship Corporation—Application under section 805(a), 6 F.M.B. 115; 121-22 (1960).

2. Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii, 5 F.M.B. 287, 297 (1957). This conclusion was not disturbed by subsequent judicial review. Pacific Far East Line, Inc. v. Federal Maritime Board, 275 F.2d 184 (D.C. Cir. 1960).

formly been given since 1951 that the 805(a) phrase "person . . . operating exclusively in the coastwise or intercoastal service" applies to protect "operators furnishing an intercoastal service that does not include foreign ports."[1] In the instant case, the Hearing Examiner found that "Matson's British Columbia calls were in connection with its Northwest service," whereas States' domestic operation on which it seeks permission to double the number of its voyages "is between *California* and Hawaii and does not involve service to or from the Pacific Northwest." Under the interpretation referred to above, Matson is not prevented by calling on a foreign port in another service from claiming status as a person operating exclusively in the domestic service for the purposes of this proceeding since in the domestic trade herein involved, the California/Hawaii trade, Matson's service does not include foreign ports. I adhere to this interpretation and so apply it here. It is a reasonable interpretation, providing protection for unsubsidized service, which I understand to be the over-all purpose of 805(a); it has been uniformly applied over a long period of time; and in the face of this known interpretation and application Congress has not changed the wording of 805(a) in this regard although it has reviewed the Act and has made many amendments as to other provisions over the years. This is good evidence that this interpretation is the correct one.[2]

Matson's standing as a "person . . . operating exclusively in the coastwise or intercoastal service" is further chal-

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1. American President Lines, Ltd.—Unsubsidized Operations, Route 17, 3 F.M.B.—M.A. 457, 470 (1951); American President Lines, Ltd.—Subsidy, Route 17, 4 F.M.B.—M.A. 488, 501 (1954); Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, 5 F.M.B. 448, 460 (1958).

2. See authorities cited *supra* in connection with the discussion of the long-standing administrative interpretation of the applicability of the 805(a) written permission requirement.

lenged on the basis of its intercorporate relationship with Oceanic, and Oceanic's operation in foreign commeree, the facts concerning which as found by the Hearing Examiner have been noted above. Matson's standing in this regard in previous proceedings was similarly challenged. The Maritime Subsidy Board in 1961 held that Oceanic's foreign operations were not to be imputed to Matson, although it was wholly-owned by Matson, and that the exclusivity of the domestic character of Matson's California/Hawaii service was not vitiated thereby.[1]

The facts concerning the Matson-Oceanic relationship and the operations of these two companies have not changed significantly since the Federal Maritime Board's 1961 decision, as I read the findings officially made in that proceeding and as made by the Hearing Examiner in the instant case. Regardless of Matson's ownership of Oceanic's stock, the two corporations are separate legal entities. Oceanic's incorporation in 1926 could not have been for the purpose, and nothing in the record has come to my attention that would lead me to conclude that its subsequent operation as a wholly-owned Matson subsidiary has had the effect, of subverting any provision of the 1936 Act. I do not feel justified, therefore, in "piercing the corporate veil" so as to disregard the legal status of these two corporations as separate persons.

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1. States Steamship Company — Application under Section 805(a) to make 14 Outbound Calls at the Hawaiian Islands in Calendar Year 1961, Docket No. S-128. 1 S.R.R. (Pike & Fischer) 599, 600b (1961), citing American President Lines—Unsubsidized Operation, Route 17, 3 F.M.B. 457 (1951). See also Pacific Far East Lines, Inc.—Sec. 805(a) Calls at Hawaii, 5 F.M.B. 287, 297 (1957), where the Federal Maritime Board, while noting facts of the Matson-Oceanic relationship and Oceanic's foreign commerce operations, also held in a previous decision as to Matson that "[i]n its service between California and Hawaii it clearly operates 'exclusively' in the domestic service." As noted previously herein, this conclusion was not disturbed in the judicial review of the *PFEL* case, *supra*, 275 F.2d 184 (D.C. Cir. 1960).

IV

UNFAIR COMPETITION

Under section 805(a) the Secretary is prohibited from granting an application for permission to operate vessels in the domestic trade while the applicant is receiving ODS if he finds that "it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service."

Matson, and Hawaii on the assumption that Matson qualifies as a corporation operating exclusively in the domestic service, contend that the record calls for a conclusion that granting States' application would under the terms of 805(a) result in unfair competition to Matson in the domestic service involved, requiring a denial of the application. The Hearing Examiner found that granting States' application would result in unfair competition to Matson, except that States should be permitted to serve San Diego 26 times yearly in each direction and to lift cargo in California for discharge in Hawaii to the extent of 26 calls a year when Matson on a first refusal basis declines to carry cargo offered to it for specific sailings.

States and San Diego contend that, assuming 805(a) to be applicable and Matson to be an exclusively domestic operator entitled to raise the question of unfair competition, sections 506 and 605(a) through their subsidy proration provisions eliminate Matson's claim of unfair competition as a matter of *law*. They contend further that as a matter of *fact* subsidy proration eliminates from States' domestic Hawaii service all elements of unfair competition. Applying its stated standards of unfair competition to the facts, the Board found that States' proposed increased sailings would not constitute unfair competition to Matson. And the Review Examiner concluded that, assuming the

805(a) tests are issues to be considered in this case, it could not be found "on this record" that Matson would suffer unfair competition by reason of the proposed additional calls by States.[1]

In my judgment 506 and 605(a) do not have the legal effect ascribed to them by States and San Diego. To adopt the theory that, although 805(a) is assumed to apply, 506 and 605(a) subsidy proration provisions as a matter of *law* eliminate unfair competition from subsidy, despite what the consequences may be as a matter of *fact* to the unsubsidized domestic operator, would imply an unawareness or a disregard on the part of Congress of the unfairness of situations even where substantial subsidy remaining after proration is used to significant advantage over an unsubsidized operator in a domestic trade. I am unwil-

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1. States views the recommended decision of the Review Examiner as also holding that, even if 805(a) were applicable, the subsidy proration provisions of 506 and 605(a) eliminate as a matter of *law* Matson's claim that States' subsidy gives States an unfair advantage over Matson in competing in the Hawaii/California domestic trade and is unfair competition under 805(a). It is not clear, however, that the Review Examiner reached such a conclusion as to the legal effect of 506 and 605(a). After noting States' contention as to the legal effect of 506 and 605(a), the Review Examiner stated that "It must be concluded that since Congress did not intend section 805(a) to apply in a case like this, it could not have intended that the payment of subsidies in the foreign commerce portion of the mixed service could be deemed to be unfair competition to the exclusively domestic operator." At other places in his recommended decision the Review Examiner referred to 506 and 605(a) as reducing or eliminating subsidy. However, it seems obvious that such statements were made on the premise of 805(a) being applicable. When the Review Examiner in a single instance made the assumption of 805(a) applicability, he did not state on the basis of such assumption that 506 and 605(a) would then as a matter of law eliminate subsidy as a basis for a claim of unfair competition, but rather he referred to the record as the basis for determining, given the assumption of 805(a) applicability, whether unfair competition would result under the circumstances of this case. See page 29 of the Review Examiner's Recommended Decision.

ling to imply such unawareness or disregard to Congress, and I do not adopt the theory.[1]

Therefore, the further question remains as to whether under the circumstances of this case unfair competition to an exclusively domestic operator would actually result from granting States' application.

My answer to this question is that I do not find that granting States' application would result in unfair competition to a carrier operating exclusively in the domestic service.

In reaching this conclusion, I have considered the opinion of the Court of Appeals for the District of Columbia in the *PFEL* case.[2] The facts of the *PFEL* case and those of the instant case differ in that the applicant in *PFEL* sought permission to operate unsubsidized vessels in a separate service in the domestic trade, and the applicant in this proceeding proposes to operate subsidized vessels in the domestic trade portion of mixed foreign and domestic voyages. The Court's conclusions in the *PFEL* case are not therefore necessarily dispositive of this case. However, it seems to me that the Court's statements as to unfair competition are as applicable to this kind of 805(a) situation as to the other.

In that case, Pacific Far East Lines, Inc. (PFEL), while operating a subsidized service between California and the Far East, had applied for 805(a) permission to operate in a separate service unsubsidized vessels between the Pacific

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1. A logical extension of this theory is that, if 506 and 605(a) as a matter of law bar consideration of evidence of factual subsidy advantage as an element of unfair competition in cases such as the instant one, then these sections would also bar consideration of evidence of factual subsidy advantage as an element of prejudice to the objects and policy of the Act. Thus, still assuming the applicability of 805(a), the holding of an 805(a) hearing, and 805(a) itself, would lose much of their meaning.

2. Pacific Far East Lines, Inc. v. Federal Maritime Board, 275 F. 2d 184 (D.C. Cir. 1960).

Coast and Hawaii. The Maritime Subsidy Board and the Maritime Administrator denied the application upon the following grounds as noted by the Court:

> "The Board found that if the application were granted, PFEL 'would be in a position to concentrate primarily on high value commodities, and would, in effect, "skim the cream" in this trade' between the Pacific Coast and Hawaii; that although PFEL's competition might divert less than 10% of Matson's tonnage, 'the diversion of Matson's revenues may be substantially greater'; that the diversion 'would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service;' and that the 'record fails to show the need for service in excess of that presently provided by Matson and other existing operators.' The Board concluded that 'to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act.' The Board thinks 'a subsidized operator should not be permitted to deprive regular domestic carriers of cargoes which they need, have the capacity to carry,' and to which the Board considers them 'fundamentally entitled.' "[1]

The Court said with reference to what Congress had intended to prevent as unfair competition, "We think Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL."[2] The Court specifically rejected the Board's view that Matson was "fundamentally entitled" to retain its monopoly against a competitor subsidized in a different trade and concluded

1. 275 F. 2d at 185-86
2. *Id.* at 186

that Matson's need and the adequacy of Matson's service had nothing to do with whether PFEL's competition would be unfair.

The doctrine of "fundamental entitlement" has subsequently been rejected by the Maritime Subsidy Board[1] and was rejected by it in this proceeding below. I agree with the Subsidy Board in this regard. I do not believe that operators exclusively engaged in a domestic trade are automatically entitled to all the cargo that they need and have the capacity to carry, vis-a-vis subsidized carriers who seek permission to operate in such trade whether with subsidized or unsubsidized vessels. If such a doctrine were applicable there would be no reason in many cases to conduct an 805(a) proceeding at all because the inevitable decision would be a denial of any application that would result in the subsidized applicant carrying any cargo that an unsubsidized domestic operator desired and could possibly carry.

In deciding *the PFEL* case the Court of Appeals observed, "The Board did not find and the record does not show that PFEL would compete fraudulently; or that it would engage in cutthroat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying sub-standard wages, or by using sub-standard ships, or otherwise; or that it would compete in any way that is unfair according to accepted legal or ethical standards."[2]

None of those who have previously considered the facts of this case—the Hearing Examiner; the Board, or the Review Examiner—found that to grant this application would result in States' competing fraudulently, in a cutthroat manner, or in a way that is unfair according to accepted generally applicable legal or ethical standards.

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1. States Marine Lines, Inc.—Section 805(a) Application, MSB Docket S-57 (Sub. No. 5), 1 S.R.R. (Pike & Fischer) 325 (1961)

2. 275 F. 2d at 186

Neither do I find that such common law varieties of unfair competition will likely result from granting States' application.

Further, the Court of Appeals in the *PFEL* decision observed that "The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade. As the examiner said, 'Matson's witness admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy.' "[1]

Again, bearing in mind the factual differences in the *PFEL* situation and in the situation involved in this proceeding, I think that the Court's indication there that competitive advantage from subsidy is a relevant factor in determining whether unfair competition would result from granting an 805(a) application is a relevant factor to the unfair competition issue here. Thus, if it were shown here that as a result of granting the 805(a) permission the applicant subsidized carrier would have, from unremitted subsidy on operations in the domestic trade involved, a substantial competitive advantage over an unsubsidized exclusively domestic operator in that trade, a finding of unfair competition and a denial of the application would seem called for.

The Board in this case was correct, I think, in concluding that "Congress intended to provide substantial protection" for domestic operators as against subsidized operators. However, I believe the Board was not correct in stating that a finding of unfair competition must be based on evidence that the resulting advantage of the subsidized operator over

1. *Ibid*

the domestic operator is "such an overwhelming, unconscionable advantage as to constitute 'unfair competition.'" And, although the Board correctly stated that "in cases where the advantages of the subsidized operators are so great as to make it unlikely that the domestic operators would be able to compete effectively, then a finding of unfair competition with respect to the proposed service should be found", I do not believe the degree of advantage must be that great in order to reach the level of unfair competition. It seems sufficient for this purpose to find that the resultant situation is one of substantial competitive advantage to the subsidized operator.

The critical question then becomes, would States obtain as a result of granting its application a substantial competitive advantage over Matson in the California/Hawaii trade because of a subsidy element?

Here, an accurate perspective requires taking into account the respective roles of Matson and States in the California/Hawaii trade.

The over-all picture that one gets from a review of this proceeding is that Matson is, and has been for many years, by far the predominant carrier in the California/Hawaii trade. Some of the pertinent findings that have been made by the Examiners and by the Board in this respect are as follows.[1] Matson's annual fleet capacity was 2,457,193 measurement tons at the time of the hearing (H.E.). In recent years Matson has carried nearly 1,500,000 tons of cargo in each direction in the California/Hawaii trade (R.E.). During the twelve years of calling at Hawaii since 1950 by States and its predecessor, Pacific Transport Lines, Inc. (PTL), their annual westbound carryings have ranged

1. For convenience at this point the Hearing Examiner's findings are identified as "H.E.", the Board's as "M.S.B.", and the Review Examiner's as "R.E.".

between 7,926 short tons and 22,430 short tons (the latter was in 1961 when 14 voyages were made), but carryings eastbound have been substantially less (H.E.). Matson makes up to 18 round voyages in the California/Hawaii trade per month, but States calls about once a month at Hawaii in each direction (R.E.). Other carriers have entered the trade from time to time, but with little or no success against Matson's efficiency and established position (R.E.). There are apparently three or four small operators now in the trade, but their carryings are relatively little (R.E.).[1] Over the last decade or more, Matson consistently has carried about 98% of all cargo between Hawaii and the Pacific Coast; and it carries about 92% of all berth line cargo (M.S.B.). It carries about 95% of the liner cargo in the California/Hawaii trade, and an even greater portion of the bulk cargo (R.E.). In 1960 Matson carried all of the sugar and molasses going from Hawaii to California (H.E., M.S.B.). Matson also carries most of Hawaii's pineapple products eastbound to California (H.E., M.S.B.). States has not been able to participate in the carriage of pineapple products (it claims this has been because of Matson's connections with the principle shippers) or in the movement of bulk sugar (because Far East originated cargo is already in the holds when States' vessels call at Hawaii) (H.E.). If States' application were granted and its annual calls increased by 13 in each direction, States' carrying in the California/Hawaii trade would increase by an estimated 67,000 tons annually (apparently westbound); States' carryings would not equal 5% of Matson's westbound ton-

1. States (Opening Brief, p. 184) and Matson (Petition to Review Opinion and Order of the Board, p. 32) name the competing carriers other than States as American President Lines, Pacific-Hawaiian Steamship Company, Pacific Inland Navigation Company, and Oliver J. Olson Barge Line. See Hearing testimony of Matson witness, Norman Scott. Tr. 4173-78.

nage and only slightly more than that eastbound (M.S.B.). For each sailing by States every two weeks, Matson would have about 14 sailings per month; in a year's time Matson would carry 22 times as much cargo as States (M.S.B.). The amount of cargo that would be moved by States under the increased sailings plan would be 5% of the total cargo moving in the California/Hawaii trade as compared with 95%; carried by Matson (M.S.B.).

In view of the above findings, it is reasonable to conclude that Matson has not had substantial competition in the California/Hawaii trade, and that the competitive situation would be changed to some, but not to a great, extent by granting States' application. In previous 805(a) cases, the Federal Maritime Board indicated, correctly I think, that carriage by the applicant subsidized operator of only a small percentage of the total cargo movement in the domestic trade involved is not substantial competition and is a factor in finding no resulting unfair competition to an exclusively domestic operator therein.[1]

At the same time, it appears that if the application is granted, States' increased service in the domestic segment of its mixed voyages would be benefitted to some extent because of subsidy.

As found by the Hearing Examiner, the Mariner vessels States would use, newer and faster than Matson's, would not have been built without CDS and would not be operated by States without ODS. While subsidy proration, as the Board noted, abates subsidy advantage to an important degree, proration will not erase the facts that these vessels are in existence and are in trans-Pacific service on Trade Route 29 passing by Hawaii and that subsidy helped build

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1. States Marine Lines, Inc.—Sec. 805(a) Application, 6 F.M.B. 378, 384 (1961); Pacific Transp. Lines, Inc.—Sec. 805(a) Application, 4 F.M.B. 146, 148 (1953).

them and put them there. For States to use these vessels, built and maintained with the aid of subsidy in order to be competitive in foreign trade with vessels of foreign operators, to make calls at Hawaii in domestic trade incidental to its foreign voyages would not, however, seem to make States chargeable with unfair competition.

Matson contends that States would enjoy in its increased service in the California/Hawaii trade other benefits from CDS after abatement. By Matson's computations, States is able to acquire Mariners because of CDS at a substantially lower cost than Matson would be able to do so. Thus, assuming the minimum statutory down payment and amortization of the balance over the 25-year life of the vessel in both instances, Matson figures that its own average annual cost of acquisition of a Mariner would be $400,505 greater than States' minus States' projected annual subsidy refund of $57,800 per vessel, or an average annual net difference per vessel of $342,705 in States' favor. The Hearing Examiner reached the same conclusion. There appears, however, to be a defect in the procedures employed in reaching this result, the defect being in the basis used for comparison. Matson (and evidently the Hearing Examiner since he reached the same result) compared the cost to Matson of a Mariner to be used full time in the domestic trade with the cost to States of a Mariner to be used only fractionally in the domestic trade. A more equivalent basis for comparison would be the costs to Matson and States respectively of Mariners used to the same extent in the California/Hawaii trade. States made such a comparison, using three different methods of allocating vessel days to the domestic California/Hawaii trade for the 26 projected voyages. Two of these methods, including a full absorption accounting method, sponsored by States, show that States, after subsidy repayment, would have a disadvantage in comparison with

Matson. The third method, predicated on a full absorption allocation basis advanced by Matson in one of its exhibits, was described by Matson as "within the zone of reason"—it showed States' yearly cost advantage per Mariner over what Matson's cost would be for the same amount of use in the domestic California/Hawaii trade to be $15,894 per year. Thus adjusted on the basis of the most favorable to Matson of the three methods, States' subsidy advantage from acquiring the Mariners is relatively small, not approaching the figure of $342,705 per vessel per year computed by Matson and accepted by the Hearing Examiner.

Matson contends that States would have a further advantage from CDS, despite abatement under section 506, in that States would have the interest-free use of that amount of CDS which would ultimately be repaid because of the domestic operation of the Mariners. According to this view, repayment of CDS at a rate of $57,800 per vessel per year over the 25 year life of a Mariner would amount to $1,445,000 of CDS that States would have had interest-free use of until required to be repaid year by year as the vessel is used in the domestic trade. Matson sees this as a benefit from subsidy worth $37,500 per vessel per year, inasmuch as that is the amount of interest that would have to be paid on a 25 year loan of $1,445,000 at 5% repaid in installments at the same rate that CDS would be repaid. The Hearing Examiner also concluded that States would have such a $37,500 per vessel per year benefit from CDS in addition to other benefits referred to. It would appear correct, however, that if this item is to be attributed here to States as subsidy benefit, it be accounted for in the previous computations concerning States' cost in acquiring a Mariner. If this were done as to the method referred to above as most favorable to Matson,

the $15,894 per vessel per year advantage there attributed to States would be reduced to $8,630.[1]

Further, it may well be, as States contends, that Congress did not intend that the interest-free use of CDS money subsequently repaid under the 506 formula be considered as an element of unfair competition. The basis for such conclusion lies in the legislative history of the 1936 Act. Section 504 of the draft Merchant Marine Act of 1935, the forerunner of section 506 of the 1936 Act, included a specific provision for the payment of interest on unpaid installments of CDS, but this provision was subsequently eliminated. Since the CDS repayment provision of section 506 was enacted by Congress without this accompanying requirement of interest payment, that may be taken as an indication that Congress did not look upon the interest-free use of CDS as an element of advantage to be reduced or eliminated. Taking this view, that interest-free use of CDS money until repaid is not a source of unfair competition, the total advantage to States per Mariner per year is again $15,894 on the basis of the method most favorable to Matson of the three methods of comparison referred to above.

Matson also contends, and the Hearing Examiner agreed,

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1. Matson's exhibit 61 shows States' and Matson's annual interest cost in acquiring a Mariner as $127,375 and $286,000 respectively, a difference of $158,705. Adding $37,500, States' interest cost would be $164,875, and the difference would be reduced to $121,205. Only 19.37% of a Mariner's time in use would be in domestic use (States' exhibit 98), so the annual difference in interest cost attributable to domestic use would be $23,477 (*i.e.*, $121,205 x 19.37%) instead of $30,741 as now shown in exhibit 98. The difference in interest cost figure being $7,264 too high, on the basis of this adjustment ($30,741 — 23,477) and this item being one of the three items going into the overall annual difference in cost (depreciation plus CDS refund plus *interest*) in acquiring a Mariner as shown in exhibit 98, the overall difference in cost figure should on the same basis be accordingly reduced. Now shown as $15,894, it thus would become $8,630 (*i.e.*, $15,894 — 7,264).

that States has, because of its subsidized status, opportunities for tax deferment that Matson does not have. This is seen as a source of competitive advantage. I do not believe that States' following of procedures sanctioned by law in this regard would amount to unfair competition within the meaning of 805(a).

The Hearing Examiner found that States' ODS would amount to $2,481 a day, or $73,189 for the 29.5 days of the segment of each voyage that its vessels would be engaged in the California/Hawaii domestic trade, for a total of $1,902,914 yearly on 26 voyages. The Hearing Examiner was incorrect in attributing the $2,481 per day to ODS. Matson agrees that this figure is an aggregate of both ODS and CDS. Of this, $1,837 per day is ODS, and $644 per day is CDS. The estimated States' subsidy refund for both CDS and ODS in the California/Hawaii trade is $1,179,976 annually, leaving $722,938 annually after such refund. This is the figure that the Hearing Examiner found would be the subsidy remaining yearly to help States carry on its 26 voyages in the California/Hawaii trade. States points out that $164,975 of this is applicable to California/Midway cargo. Also States calls attention to the fact that, of the freight that would be carried by it in the California/Hawaii segment of the 26 mixed voyages, 61.5% of the tonnage would be made up of cargo in the foreign trade. Thus, States emphasizes that of the $1,902,914 CDS and ODS originally allocated on an annual basis to the California/Hawaii segment of 26 voyages on Trade Route 29, only $557,963 or 29.3% is left to help carry on that segment a cargo that by volume is 61.5% foreign. In its reply brief to exceptions to the Hearing Examiner's recommended decision,[1] Matson concedes that the subsidy that would after

1. At p. 42

abatement remain to States in the California/Hawaii trade would be beneficial to States also in providing its foreign trade service. Finally, it must be remembered that although the discussion in this paragraph as to residual subsidy has been with regard to the total *26* voyages, present and projected, we are concerned with an application for authorization of only *13* voyages in addition to those already authorized and whether granting an additional 13 voyages would result in unfair competition. Therefore, the foregoing projections as to residual subsidy on 26 voyages should be cut down accordingly in seeking to determine the result of the additional 13 voyages. With these various adjustments, the $722,938 figure found by the Hearing Examiner in this respect would be reduced considerably.

Matson argues that States' 26 calls at Hawaii incidental to its service on Trade Route 29 would be profitable, if at all, only on an incremental accounting basis, whereas profitability should be tested on a full-absorption basis, allocating joint costs to the domestic segment of such mixed voyages as well as to the foreign segments. Consequently, Matson used two methods of full absorption accounting producing respectively the results that States would lose annually $905,458 or $1,280,416 on these 26 calls. Matson asserts that such losses would be covered by the subsidy paid States on the trans-Pacific voyages incidental to which the domestic calls would be made, and that such subsidy would be, therefore, a crutch for the domestic calls at Hawaii. States counters with arguments that in this situation incremental accounting is realistic and appropriate and should be used, and that full absorption accounting is not required by law to be used in determining whether subsidy support would be given to domestic service. States also introduced two methods of full absorption accounting that

produce the results respectively that States would enjoy profits from the domestic service alone of approximately $258,000 or $41,000 annually. The disparity in results reached by the Matson and States methods of full absorption accounting apparently flows from different methods of allocating fixed costs, such as from the inclusion by Matson, but the exclusion by States, of $546,000 of administrative and general expenses, including advertising, among costs to be allocated, and from the inclusion by Matson, but the exclusion by States, of interest expense among costs to be allocated. The Hearing Examiner concluded that a full absorption, rather than an incremental, accounting method is appropriate to a determination of whether the domestic portion of States' voyages would bear its proper burden of the total cost. He found that, based on full absorption accounting, States would incur net losses annually on the domestic segments of the 26 mixed voyages in question of $1,280,416 or $905,458, depending on which of two methods is used—precisely the figures produced by Matson's two methods. The Hearing Examiner did not refer to the methods of absorption accounting advanced by States. It will be noted again that this finding is with regard to all 26 voyages, and not merely as to the 13 additional ones for which authority is sought by the application.

It is clear that States calls at Hawaii would be profitable on an incremental accounting basis. Whether these calls would be profitable on a fully-allocated cost basis is not so clear. Unfortunately, no impartial accounting study in this regard is to be found in the record. Particularly with regard to the designation of items as fixed costs of doing business by an enterprise, and as to the proportions in which they are properly allocable to different operations, there are several methods of cost allocations, producing a variety

of results. It is not surprising that Matson's allocations in this regard showed States' domestic operations to be unprofitable and that States' allocations showed them to be profitable — by different methods of full absorption accounting.

However, because the Hearing Examiner found that States' California/Hawaii service would be unprofitable on a full absorption basis and the Board stated as fact that States' service in this respect could pay for itself on an incremental cost basis only, and there is substantial evidence of record to support this conclusion, it is accepted. At the same time I agree with the Board that such a finding is not automatically dispositive of the case.

The Board correctly pointed out that, besides the fact that sections 506 and 605(a) abate to an important degree the privileges and advantages provided to the subsidized operators, there are other equalizing forces that would operate to help prevent States from having an unfair advantage from its proposed increased service. These equalizing forces, as the Board noted, include on the one hand statutory and contractual restrictions upon the subsidized contractor and, on the other, government aid in various forms and in substantial measure to domestic operators.

The net result, however, even after subsidy abatement and the operation of equalizing forces, is that States would apparently have some residual benefits from subsidy in the proposed additional voyages in the California/Hawaii trade. I do not find from the record, however, that States would have because of residual subsidy a substantial competitive advantage over Matson. The picture of the California/Hawaii trade is one of growth—even by Matson's standards it is expected to continue to grow at a rate of from 1% to 2% each year. This projected growth, coupled with other findings noted above concerning Matson's pre-

dominance in this trade as compared with States, makes it appear reasonable to expect that Matson would within 5 years be carrying as much cargo as it now does. Meanwhile, effective competition would be increased modestly in this trade as a result of granting the application. But effective competition is not to be equated with unfair competition.[1]

I therefore do not find that to grant States' application would result in unfair competition to any person operating exclusively in the coastwise or intercoastal service. Accordingly, I will not deny States' application on unfair competition grounds. However, the evidence presented by both sides on this question appears sufficiently close that I believe further consideration of the issue in the light of experience would be warranted after the passage of a reasonable period of time. Direction for this to be accomplished is provided later in this decision.

V

PREJUDICE TO THE OBJECTS AND POLICY OF THE ACT

As already indicated, I do not find that granting States' application would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service. Nevertheless, the question remains whether granting the application would be prejudicial to the objects and policy of the Act.[2]

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1. Pacific Far East Line, Inc. v. Federal Maritime Board, 275 F. 2d 184, 186 (D.C. Cir. 1960).

2. If to the contrary it were found that unfair competition would result from granting the application, a finding also of prejudice to the objects and policy of the Act would be indicated inasmuch as unfair competition obviously is contrary to the objects and policy of the Act. However, the objects and policy of the Act embrace more than fair competition, and the fact that it is not found that unfair competition would result from granting the

(a) Provisions of the Act concerning policy and objectives.

The objects and policy of the Act are set out in sections 101 and 210. Section 101 declares it to be the policy of the United States to foster the development and encourage the maintenance of a merchant marine which is sufficient to carry the domestic water-borne commerce and a substantial portion of the water-borne foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such commerce; capable of serving as a naval and military auxilliary in time of war or national emergency; owned and operated under the United States flag by United States citizens as far as practicable; and composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with citizen personnel. Section 210 states as objectives, first, creation of an adequate and well-balanced merchant fleet to provide shipping service on all routes essential for maintaining the flow of United States foreign commerce, the vessels of which are to be designed so as to be readily and quickly convertible into transport and supply ships in time of national emergency; second, ownership and operation of such a fleet by United States citizens so far as practicable; and, third, planning of vessels designed for the best and most complete protection of passengers and crew against fire and marine perils.

(b) Objects and policy concerned in this case.

It is apparent from the evidence, the arguments advanced by the parties, and from the decisions previously reached in this proceeding that the concern here is whether the

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application does not of itself preclude a finding that approval of the application would be prejudicial to the objects and policy of the Act for other reasons.

grant of States' application would be prejudicial to the development and maintenance of an adequate and well-balanced merchant marine or prejudicial to the provision of ocean transportation services needed by the shippers and the geographic areas involved. More specifically, would grant of States' application have a significant detrimental impact on the competitive position of the domestic operator in the California/Hawaii trade, Matson? And would it, on balance, have a significant adverse effect on present and/or projected service in the California/Hawaii domestic trade or on the U.S./Far East foreign trade on Trade Route No. 29?

In addition, a number of subsidiary and related propositions have been in contention at different stages of this proceeding, along with the somewhat separate contention of Matson that approval of the application would also result in subsidy diversion, prejudicial to the objects and policy of the Act.

(c) Impact on the competitive position of Matson.

The Hearing Examiner concluded that as a result of granting permission to States for the proposed additional 13 voyages, and based upon States' estimate of the total annual cargo it would in that event carry in the California/Hawaii trade, States would divert cargo on those additional voyages from Matson's planned fleet in such quantity as to cause Matson a net annual loss of earnings, after income tax, of from $550,000 to $846,000.[1]

States has challenged this finding as being based on the premise that all of the cargo which it is estimated States would obtain would be diverted from Matson. States argues

1. The Review Examiner, on the other hand, concluded that Matson's estimates as to reduction in net revenues, from which the $550,000 and $846,000 were derived, are unacceptable because based on unrealistic assumptions, including an assumption of a drop in patronage not supported by the record.

that the trade is expanding at a rate (at least by from 1% to 2% annually in the westbound trade by Matson's estimate) such that the cargo growth alone would in five years more than cover the cargo that it is estimated States would carry on its additional voyages. States further argues that the Matson "penetration" studies, on which the finding of diversion was based, are invalid because they assumed a planned Matson fleet, the composition of which was changed after the studies were made. And States contends that the estimated additional cargo it would carry could not be diverted from Matson anyway because Matson's high utilization of capacity would not permit Matson to carry such cargo.

Matson responds that the projected growth in trade will not occur over night and that in the meantime adding the States voyages would overtonnage the trade and that the cargo taken by States would be that which Matson would otherwise carry; that States' argument of invalidity of the penetration studies is a quibble, since the result would be a substantial loss to Matson, regardless of a changed intermediate composition of its fleet between that of the time of the studies and that which is planned; and that the evidence shows Matson's fleet would be adequate now and in the future to carry the cargo that States estimates it would obtain with the additional sailings.

The Board estimated that States, by adding the proposed calls at Hawaii in the domestic trade, would increase its carryings in that trade by not more than 67,000 tons of cargo annually (apparently westbound).[1] The Review

1. Matson points out that 67,000 tons figure is for the 13 additional calls westbound only, that the inclusion of eastbound cargoes raises the figure to 85,000 tons for these 13 calls, and that States' California/Hawaii carryings on all 26 calls both directions would be 189,000 tons.

Examiner agreed with this tonnage figure, and noted that Matson had been carrying nearly 1,500,000 tons of cargo annually in each direction in the California/Hawaii trade. The Board further found that if the application were granted States' carrying in this trade would not equal 5% of Matson's westbound tonnage and only slightly more than that eastbound; that for each sailing by States every two weeks Matson would have about 14 sailings per month; that in a year's time Matson would carry about 22 times as much cargo as States; and that States' cargo with 26 calls at Hawaii would be about 5%, and Matson's about 95%, of the total cargo moving in this trade.

Although it appears that granting States permission to make the requested 13 additional calls at Hawaii in the domestic trade would result in States obtaining some 85,000 tons of cargo eastbound and westbound, it is unlikely that Matson would lose a corresponding amount of cargo, as seems assumed by the loss of earnings figures advanced. The Board concluded that Hawaii's economy would expand at an annual rate of from 5 to 10%, resulting in an annual cargo growth of more than enough in a single year to cover the estimated increase in States' carryings. Matson's Vice-President, freight division, estimated cargo growth in the trade at from 5 to 10% for the succeeding five-year period,[1] a rate of growth of 1 to 2% annually, particularly because of population increase. Even at the latter rate, within five years States' increased carryings would be more than offset by growth of cargo in the trade. Matson points out correctly, I think, that States' increased carryings would not all come immediately from growth in the trade. Even so, it does not follow that all cargo that States would gain in this trade other than from trade growth would be cargo

1. Matson witness, Norman Scott, Tr. 4190

subtracted from that which Matson otherwise would carry. It appears that Matson's high utilization of vessel capacity has meant that from time to time it was unable to carry cargo when offered in this trade.

At the same time, it may be, as Matson charges, that much of the cargo States would carry on its additional calls would consist of the more profitable items for carriage, including automobiles, household goods in sea vans, and MSTS cargoes. If that turned out to be the case, the fact that Matson may not in time suffer any net loss in tonnage would not tell the whole story, for Matson's revenues could still be down if the lost cargoes were replaced in considerable part by carryings of less profitable items. However, it is not clear to what extent Matson would lose cargoes in these categories to States as a result of States' increased service. States may obtain more such cargoes because of inability of Matson to carry them. The Hearing Examiner noted evidence that from time to time automobile shippers have been unable to get space on Matson's vessels when it was wanted. Also, Matson's containerization program may reduce its conventional space relatively, so that cargoes that are not readily susceptible to containers would seek conventional space from States—household goods in sea vans, for example. The fact that States would obtain more MSTS cargoes with additional calls at Hawaii in the domestic trade would not be the result of any effort on States' part to "skim the cream" in this trade, inasmuch as MSTS cargoes are allocated on an indiscriminate basis to carriers in the trade. Further, it is reasonable to expect that with more frequent sailings shippers of general cargo would increasingly ship with States, and that its cargo mix would have a lower proportion than it now has of the enumerated high net revenue, more easily handled items. At any rate,

although the Hearing Examiner thought automobiles and household goods in sea vans would be diverted to a greater degree if the application were granted, the Board was not persuaded that States would engage only in so-called "cream-skimming" practices, and the Review Examiner concluded that the evidence does not support the fear that States would take a large proportion of high-rated cargo from Matson.

While as a result of granting the application there will probably be some diversion of cargo and there may be some loss of earnings to Matson (perhaps more than States estimates but less than Matson estimates), especially in the period immediately after States institutes the increased service, I do not believe that these facts alone require a finding of prejudice to the objects and policy of the Act. To reach such a conclusion would involve application of the doctrine of fundamental entitlement, but that doctrine has been rejected, and in my judgment should not be applied in determining the issue of prejudice to objects and policy of the Act any more than it should in determining the issue of unfair competition.[1]

I think the Board was correct in saying that the question of prejudice must be weighed in the light of public interest, and that the entire competitive relationships involved must be weighed in determining how the public interest will be served best.

Also, as the Board observed, impact from granting an 805(a) application on the competitive position of domestic carriers in the domestic trade involved will vary with the particular circumstances of different cases. The amount of protection required for the unsubsidized domestic oper-

1. See discussion in connection with "Unfair Competition," *supra*, p. 37.

a[illegible]or thus is a matter of judgment, and depends in part on the circumstances of its position in the trade relative to that which the applicant would have if its requested permission is granted.

The findings of the examiners and the Board as to Matson's greatly predominant position relative to that of States, now and after grant of the application, have been summarized above. Matson has been so-well established, so long in this trade, and has such shipper connections, according to the record, that the estimated amounts of diversion and revenue loss would not seem to pose a serious threat to Matson's competitive position in this trade. I agree with the Board's conclusion that States' additional sailings would not have such a competitive effect on Matson as to lessen substantially the ability of Matson to compete for available cargo. I do not find in this case that there would be such a significant detrimental impact on the competitive position of this domestic operator in the California/Hawaii trade as would be prejudicial to the objects and policy of the Act.

(d) Effect on service.

Not only the applicant, States, but also those intervening in this proceeding, San Diego and Hawaii, assert that Matson's service in the California/Hawaii trade is inadequate.

The findings and conclusions of the examiners and the Board in this regard should be considered. The Hearing Examiner, while not concluding that Matson's service has been insufficient to accommodate the day-by-day requirements of the trade, referred to a number of factors which may be taken as signs of service inadequacy. Thus, it was found that States obtains westbound cargo on its present 13 voyages in the domestic trade without solicitation—automobile manufacturers book space on States westbound ves-

sels as much as six weeks in advance of sailing dates; household goods in sea vans are booked two to three weeks in advance; and shippers of other cargoes book with States by telephone when they have offerings. The Hearing Examiner also recognized that shippers of used automobiles had on occasion been unable to get space on Matson's vessels when they wanted it, but he concluded that Matson had done much to alleviate that situation. The Board found that States carries westbound only that amount of cargo which Matson is not able to accommodate, and it referred to evidence of record showing a scarcity of space aboard Matson ships westbound, the unusually high utilization of Matson's capacity and complaints indicating that Matson's services do not fully meet the needs of many shippers. The Review Examiner found that Matson runs a "tight service," frequently experiencing only about 5% unused space per vessel, which he characterized as "an unusually high vessel utilization," and that the trade by no means can be considered over-tonnaged. The Board also noted that freight rates in this trade are very high. The Hearing Examiner, observing that competition or the lack of it nearly always colors one's business activities and that Matson may not always have been as acutely alive to the needs of patrons as it might have been, noted that some shippers had expressed dissatisfaction with Matson's service. At the same time he found that island shippers were generally satisfied with Matson's service. He found that some instances of Matson's inability to provide space were caused by unusual conditions such as labor disturbances, but that others were the result of various kinds of neglect and still others were simply the inability to furnish space at the time requested. It was also observed by the Hearing Examiner that the "free space" figures put into evidence by Matson to prove

that it has sufficient space available for needs of the California/Hawaii trade may not have been accurate in all relevant respects. The Hearing Examiner emphasized Matson's service to the trade since 1882, serving all the islands and carrying bulk, along with other, cargoes. Noting that Matson had discontinued service to San Diego,[1] the Hearing Examiner found that the record fully supports the need for States' service at San Diego.

As to future service in the California/Hawaii trade, the Hearing Examiner detailed an $8,000,000 fleet improvement program Matson had taken steps to institute. He stated that Matson would continue to furnish some direct service to the Neighbor Islands and would also provide container service by barge, which he concluded would mean more service for these islands. The Hearing Examiner also stated that most island witnesses were afraid that the regularity of Matson's service to them might be disturbed if the States' application is granted. He further observed that States had not in the past, and would not, if its application were granted, carry bulk cargo, but would benefit from carrying a small number of high revenue, easily handled commodities. The Board said it was not persuaded that States would engage only in so-called "cream-skimming" practices, and the Review Examiner found that the evidence does not support the fear expressed by Hawaii that States would take a large proportion of high-rated cargo, and thereby force Matson to raise its rates on lower-rated commodities. The Review Examiner found "incredible" the contention that increasing States' service by about one call a month would make such inroads on Matson that Matson's ability to serve the trade would be jeopardized. The Hearing Ex-

1. Matson discontinued its San Diego service as of February 23, 1960. San Diego witness, William R. Daly, Tr. 3271.

aminer was of the opinion that although Matson's revamping of its fleet would withdraw some tonnage from active service, there is no reason to believe Matson will not have sufficient tonnage to meet the Hawaiian trade's growth requirements in the immediate future. Even so, the Hearing Examiner recognized that there will probably continue to be instances of Matson being unable to lift offerings for Hawaii when tendered. And, noting the unusual dependence of Hawaii on water transportation, he observed that Hawaii should not be entirely at the mercy of Matson. The Board concluded that States' additional service would not overtonnage the trade but would help "remedy some of the tightness of Matson's closely run service." The Board also concluded that permitting States a greater opportunity to engage in the Hawaii trade likely would provide sufficient cargo for regular calls at San Diego, and that such direct service to San Diego would not only furnish needed service to that port but would aid in meeting national defense requirements in facilitating the movements of military cargo from an important military base to outlying defense areas in the mid-Pacific and the Far East.

While there may be generally sufficient carrying capacity for the California/Hawaii trade eastbound, from a consideration of the above findings, which have substantial support in the record, I have serious doubt that there has been adequate service westbound in this trade. Further, although Matson has instituted fleet improvement, the planned fleet is to have an annual capacity somewhat below that of the Matson fleet as it existed while the record was open.[1] In view

1. Annual capacity of Matson's present fleet, 2,457,193 measurement tons; of its planned fleet, 2,449,118 measurement tons. Matson's Reply Brief to States' and San Diego's Opening Briefs, p. 90, citing Exhibit 110, sheet 6, Tr. 5692.

of the anticipated growth of the trade as discussed above, it does not appear that the planned facilities of Matson would accommodate the needs of that trade. Additional service therefore seems justified.

I have considered Matson's argument and Hawaii's expressed fear that granting States' application would or might result in impairment or curtailment of Matson's service; but, bearing in mind the predominance of Matson and its established position in the trade plus the projected growth of the trade, this does not seem a likely result. Rather than being merely a "cream-skimming" operation, the proposed increased States' service at this juncture offers promise of remedy for the "tightness of Matson's closely run service," as the Board expressed it. The actual effect of States' additional calls at Hawaii on service in the trade would appear in practice of course. If the consequences were to eventualize as Matson and Hawaii forecast them, those events of course would weigh against further permission for States to operate in this trade while receiving ODS. The desirability of prescribing a procedure for reviewing the results of granting the application after a reasonable period is again obvious.

Matson makes the point that States' primary obligation is to the foreign trade which it is subsidized to serve. Matson then asserts that the increased availability of California/Hawaii cargo to States would weaken its efforts to serve the California/Far East trade on Trade Route 29. The examiners and the Board all found against Matson in this respect.[1] Their findings on this point do not appear

1. "There is no satisfactory proof that States has done this in the past or will do so if the application is granted." Hearing Examiner's Recommended Decision, p. 25. "There is no evidence to establish that in the past States has, nor in the future, States will subordinate its obligation to serve the foreign trade for the

to be an incorrect reading of the record, and I affirm them. In the same vein, Matson further argues that States' reservation for domestic cargo of some 40% of its vessel space on westbound voyages calling at Hawaii is inconsistent with States' primary obligation to the subsidized foreign trade. Matson cites the Board's decision in the Grace Line portion of the *Puerto Rico* case,[2] as holding that Grace could not validly under the Act devote 70% of its vessels to the domestic trade. Matson contends that the instant case differs from the *Grace* case only in degree and that on the basis of the holding in that case the same result should obtain here — to grant the application would be contrary to the objects and policy of the Act. The Maritime Subsidy Board distinguished the *Grace* case from the instant case, pointing out that in the *Grace* case many carriers were already providing service in the trade, the service was overtonnaged or nearly so even without Grace's additional service, and the rates between the mainland and Puerto Rico were relatively low because of substantial competition, none of which factors were found to be present in the case at hand. And, whereas the Board characterized the distribution of domestic to foreign trade that would have resulted from grant of the Grace application as "grossly disproportionate," it concluded that the States' ratio of domestic to foreign trade in this case would not be so disproportionate as to

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benefits to be derived in the domestic trade." Final Opinion and Order of the Board, p. 32. "The record would not support a finding that the plan of operations, with the 13 additional calls at Hawaii, will result in impairment of States' ability to serve the foreign trade, as contended by Matson." Review Examiner's Recommended Decision, p. 32.

2. Grace Line Inc., American Export Line, Inc., U.S. Atlantic-Puerto Rico Service, M.S.B. Docket Nos. S-140 and S-141, 2 S.R.R. (Pike & Fischer) 1101 (1963). The Secretary of Commerce affirmed the Grace Line decision. Grace Line Inc., M.S.B. S-140, 3 S.R.R. (Pike & Fischer) 870 (1964).

run counter to subsidy concepts which are designed primarily to permit our flag carriers to compete effectively with foreign carriers in the foreign trade. Certainly the ratio of domestic to foreign cargo that an 805(a) applicant would have if its application were granted is a pertinent consideration to be weighed with others in determining whether the grant would be prejudicial to the objects and policy of the Act. Under the circumstances of this case, I agree with the Board's conclusion that the ratio expected for States would not be so disproportionate as to call for a denial of its application on the ground of prejudice.

Not only would granting the application in this case not be detrimental to States' service in the Far East trade, but contrariwise there is reason to expect that benefits to the foreign commerce would accrue from the grant. Thus, the Board concluded that it is possible that States' increased service to San Diego in the California/Hawaii trade would generate additional cargo in both Hawaii and the Far East, promoting rather than prejudicing the objects and policy of the Act. And the Board found that increasing the number of States' California/Hawaii sailings would increase the opportunity for generating more combination cargo to Hawaii and the Far East from the mainland, and to the Far East from the mainland to Hawaii.

(e) Alleged "diversion" as prejudice.

Matson, referring to its unfair competition argument that to grant the application would result in States' California/Hawaii service receiving direct and indirect subsidy support in various ways, asserts that each of these ways constitutes a diversion of subsidy into the domestic trade. Thus, Matson contends all the elements of unfair competition arising out of such subsidy support also amount to prejudice to the objects and policy of the Act. Neither of the examiners nor

the Board found that granting the application would result, on the basis so advanced, in prejudice to the objects and policy of the Act. The contentions of Matson concerning the various alleged means of subsidy support for States' proposed domestic service have been examined in the discussion on unfair competition, *supra*. Had I determined that States' proposed domestic service would be supported by subsidy so as to constitute unfair competition, the argument that grant of permission for such service while States receives ODS would be prejudicial to the objects and policy of the Act would of course be persuasive. However, my conclusion that there would not be subsidy support of States' service from the means alleged by Matson such as to amount to unfair competition leads me also to conclude that there would not be subsidy "diversion" into the domestic trade such as would be prejudicial to the objects and policy of the Act.

(f) Other considerations.

Besides consequences referred to above that would not constitute prejudice to, but would promote, the objects and policy of the Act, granting States' application should also result in a sizeable reduction of subsidy to States, estimated by the Board to be $800,000 annually in ODS alone. Also a further degree of competition would be present in the trade. While the application is not granted in order to accomplish these results, they will not prejudice the objects and policy of the Act, to say the least.

At the same time I wish to emphasize that approval of this application does not mean that it is felt desirable to encourage subsidized operators to build up ocean transportation service in our domestic trades. Ideally, we could wish for adequate service in those trades entirely by unsubsidized operators. However, each case of an 805(a) application

by an operator of vessels in the mixed trades enumerated in sections 506 and 605(a) must be considered on its own facts to determine whether approval of the application would result in unfair competition to a domestic operator or be prejudicial to the objects and policy of the Act. Obviously when Congress in sections 506 and 605(a) specified certain mixed trades in which subsidy *may* be paid provided subsidy is prorated according to formulae set out in those sections it contemplated that it would be in the public interest for subsidized carriers to provide service in those trades in some cases. Also the execution of authority under 805(a) to grant or deny written permission to carriers to operate in domestic trade while receiving ODS necessarily involves the exercise of administrative discretion.

Weighing all the factors here, I have concluded, on balance, that the objects and policy of the Act would not be prejudiced in this case by approval of the application. Rather, it would be in the public interest to approve the application, particularly when provision is made, as is done, for a review of the case at the end of a reasonable period to see whether the permission should be continued.

VI
CONCLUSIONS

Section 805(a) of the Merchant Marine Act of 1936, as amended, requires the States Steamship Company to obtain written permission in order to increase its service, as proposed, between California and Hawaii.

The Matson Navigation Company operates "exclusively in the coastwise or intercoastal service" within the meaning of section 805(a) of the Act.

I do not find that granting States' application would result in unfair competition to any person, firm or corporation

operating exclusively in the domestic service.

I do not find that granting States' application would be prejudicial to the objects and policy of the Act.

Therefore, States is authorized to increase its present service in domestic trade to the extent that vessels operated on Trade Route 29 in its subsidized "C" service, supplemented by those in its subsidized "B" services, may call at Hawaii not to exceed 26 calls westbound and 26 calls eastbound per year.

There are obvious handicaps to decision-making in proceedings of the kind before me. Whether to grant a section 805(a) application depends upon ultimate findings as to what the consequences of granting it would be. Evidence is received as to what the situation is at the time of the hearing, and on this basis projections are made as to what the situation would be if the application were granted. Uncertainties are necessarily involved in a judgment as to what future consequences will be. If unfair competition would not (or would) result next month, or next year, from a decision to grant the application, what would be the situation several years hence? If it would not be prejudicial to the objects and policies of the Act to grant the application today, would the grant today be followed by prejudicial consequences at some future time?

Because the consequences of granting the application cannot be known with certainty and may change from time to time, I think it best not to grant States' application for an indefinite period without provision for review. The situation, both with respect to the *existing* authorization and to the additional authorization covered by the present application, should be reviewed and appropriate action taken at the end of a reasonable period within which experience can be gathered as to whether the States' voyages in the

domestic trade actually constitute unfair competition to a domestic operator or are prejudicial to the objects and policy of the Act.

Therefore, at the expiration of a three-year period, the Maritime Administration will take prompt steps to schedule an appropriate (and expeditious) proceeding in order to determine on the basis of accrued actual experience whether the authorization for 26 States voyages, or any part thereof, should continue in effect.

SO ORDERED

/s/ JOHN T. CONNOR
John T. Connor
Secretary of Commerce

July 6, 1965

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1. The Maritime Subsidy Board, and the Federal Maritime Board before it, have in previous decisions granted authorizations on less than an unlimited basis, either by limiting the time of authorization, or by making the authorization subject to subsequent reconsideration and, if shown to be warranted, recission or modification. American Export Lines, Inc.—Sec. 805(a) Application Docket S-134, 1 S.R.R. (Pike & Fischer) 919 (1962); Pacific Transport Lines, Inc.—Sec. 805(a) Application, Docket S-18 (Sub. No. 1), 4 F.M.B. 146 (1953). See also T. J. McCarthy Steamship Co.,—Sec. 805(a) Application, Docket S-67, 6 F.M.B. 3 (1960); American President Lines, Ltd.—Unsubsidized Operation, Route 17, Docket S-17, 3 F.M.B.—M.A. 457 (1951).

Appendix D

The full text of Section 805(a), Merchant Marine Act, 1936 (46 U.S.C. § 1223(a)) is as follows:

"(a) It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1171-1182 of this title, or to charter any vessel to any person under section 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board [*] or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is

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*Section 304 of Reorganization Plan No. 7, effective August 12, 1961, 75 Stat. 840, abolished the Federal Maritime Board, and Section 202(b)(1) of said Plan transferred all functions under Section 805(a) to the Secretary of Commerce.

made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

"If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."

Appendix E

In the United States District Court for the District of Hawaii
Civil Action No. 2235
Entered: 8/17/64.

United States of America,
Plaintiff,

v.

Alexander & Baldwin, Ltd.; Castle & Cooke, Inc.; C. Brewer & Company, Ltd.; American Factors, Ltd.; and Matson Navigation Company,
Defendants.

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on January 20, 1964; and the parties hereto, by their respective attorneys, having consented to the making and entry of this Final Judgment without trial or adjudication of any issue of fact or law herein, and without admission by any party in respect to any such issue;

Now, therefore, before the taking of any testimony and upon said consent of the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

This Court has jurisdiction of the subject matter hereof and the parties hereto. The complaint states claims against

defendants upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended, and under Section 7 of the Act of Congress of October 15, 1914, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes," commonly known as the Clayton Act.

II

Defendants Castle & Cooke, Inc. (herein called "C&C"), C. Brewer and Company, Limited (herein called "Brewer") and American Factors, Limited (herein called "Amfac") shall sell within sixty (60) days all of the shares of capital stock of Matson Navigation Company (herein called "Matson") owned or controlled by said defendants C&C, Brewer and Amfac and their subsidiaries.

III

Defendants C&C, Amfac and Brewer and their subsidiaries are enjoined and restrained from acquiring any assets or stock or other share capital of defendant Matson or entering into any contract or conspiracy with any defendant to control defendant Matson.

IV

Defendant Alexander & Baldwin, Inc. (herein called "A&B") is enjoined from selling any of its stock in Matson to (1) defendants C&C, Amfac, or Brewer; (2) Theo. H. Davies & Company, Limited (herein called "Davies"); (3) California and Hawaiian Sugar Refining Corporation (herein called "C&H"); (4) any shipping line calling regu-

larly at Hawaiian ports; (5) any corporation regularly engaged in shipping pineapple from Hawaiian ports; (6) a subsidiary of or any person owned or controlled by any of the above; (7) an officer, director or executive employee of any of the above.

V

Defendants C&C, Amfac and Brewer and their subsidiaries are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person who is serving as a director, officer or executive employee of Matson or any subsidiary thereof.

VI

1. Defendant Matson and its subsidiaries are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person who is serving as a director, officer or executive employee of (1) defendants C&C, Amfac, or Brewer, or any subsidiary thereof, or (2) Davies, or (3) any other American shipping line calling regularly at Hawaiian ports, or (4) any subsidiary of Davies or such shipping line.

2. Defendant Matson and its subsidiaries are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person (other than a director, officer, or executive employee of A&B or any subsidiary thereof) who is serving as a director, officer or executive employee of (1) C&H, or (2) any corporation shipping pineapple or sugar from Hawaiian ports, or (3) any subsidiary of C&H or such corporation.

VII

Defendants A&B, C&C, Amfac and Brewer are enjoined and restrained from seating as a director, or employing as an officer or executive employee, any person who is serving as a director, officer or executive employee of (1) any other of said defendants, or (2) Davies.

VIII

Defendant A&B and its directors, officers and employees are enjoined and restrained from discussing with any director, officer or employee of C&C, Brewer, Amfac or Davies which ocean carrier or carriers shall be used by C&C, Brewer, Amfac or Davies for their shipments of products or goods from or to the Hawaiian Islands.

IX

Each director, officer or executive employee of defendant A&B is enjoined and restrained, while he is simultaneously a director, officer or executive employee of C&H, from taking part in any discussions concerning, and from voting on, any proposals for the carriage of sugar by Matson or by any carrier competitive with Matson.

X

Defendant A&B is ordered to grant to any person purchasing pineapple from it or its subsidiaries the right to select the port to which such pineapple shall be shipped and the carrier on which such shipment shall be made.

XI

Defendant Matson is enjoined and restrained from employing as its agent for the soliciation of freight on Oahu (1) C&C, Amfac, Brewer or Davies, or (2) any of their subsidiaries, or (3) any person employed for the solicitation of freight by any other shipping line competitive to Matson and calling regularly at Hawaiian ports.

XII

For the purpose of securing compliance with this Final Judgment, and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any of the defendants, made to its principal office, be permitted (1) access during reasonable office hours to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendants relating to any of the subject matters contained in this Final Judgment, and (2) subject to the reasonable convenience of defendants, and without restraint or interference from them, to interview officers or employees of defendants, who may have counsel present, regarding any such matters; and, upon such request, defendants shall submit such reports in writing to the Department of Justice with respect to matters contained in this Final Judgment as may from time to time be necessary to the enforcement of this Final Judgment. No information obtained by the means provided in this Section XII shall be divulged by any representative of the Department of Justice to any person, other than a duly authorized representative of the Executive Branch of plaintiff, except in the course of legal proceedings to which the United States of America is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XIII

At any time after ten (10) years from the date of this Final Judgment plaintiff may move the Court for an order that A&B shall divest itself of all capital stock and other

proprietary interest in Matson then held by A&B. Upon the filing of such a motion the Court shall order such divestiture unless A&B shall show to the satisfaction of the Court either, that substantial competitive conditions exist in the transportation of freight from Hawaii to the West Coast of the United States, or, if substantial competitive conditions do not exist, that this situation does not exist as a result of A&B's stock and other proprietary interest in Matson.

XIV

This Final Judgment shall not constitute a bar or an estoppel to plaintiff from instituting and prosecuting, at any time, against defendants Matson or A&B a proceeding charging that A&B's stock or other proprietary interest in Matson, including the stock acquired pursuant to this Final Judgment, violates the antitrust laws.

XV

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment or for the modification or termination of any of the provisions thereof, and for the enforcement of compliance therewith and punishment of violations thereof.

Dated: August 17, 1964.

/s/ MARTIN PENCE
United States District Judge

Appendix F

Financial Results of States' California-Hawaii Service on 26 Voyages—Estimated Year

	Exhibit 65 Basis (Gross Revenue Allocation)		Exhibit 66 Basis (Revenue-Ton Mile Allocation)	
	Dollars Allocable to Cal.-Haw.	% of Total Foreign and Domestic Allocable to Cal.-Haw.	Dollars Allocable to Cal.-Haw.	% of Total Foreign and Domestic Allocable to Cal.-Haw.
1. Gross Revenue	$ 3,939,456	24.40	$3,939,456	24.40
2. Direct Cargo Handling and Port Expense	(2,015,478)	30.92	(2,015,478)	30.92
3. Net to Vessel Revenue	1,923,978	19.96	1,923,978	19.96
4. Operating Differential Subsidy (ODS)	874,045	24.40	694,937	19.40
5. Net to Vessel Revenue Plus ODS	2,798,023	21.17	2,618,915	19.81
6. Vessel Expense	(1,590,124)	24.40	(1,264,279)	19.40
7. Vessel Depreciation	(367,842)	27.71	(257,622)	19.43
8. Administrative and General Expense (including Advertising)	(460,217)	27.53	(420,457)	25.16
9. Interest Expense	(480,280)	39.87	(402,039)	33.39
10. Domestic Trade Reduction (ODS and CDS)*	(1,179,976)	85.10	(1,179,976)	85.10
11. Net Profit (Loss) Before Taxes	$(1,280,416)		$ (905,458)	

*Of which $873,686 is ODS reduction and $306,290 is CDS refund.

Record Sources: SC81 (Exhibit 65); SC82 (Exhibit 66); STr. 5004, 5180-87, 5213-17, 5226-27, 5234-36, 5239, 5904-05.

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In the Supreme Court

of the

United States

OCTOBER TERM 1968

No. 525

MATSON NAVIGATION COMPANY,
Petitioner,

vs.

C. R. SMITH (SUCCESSOR), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY, and SAN DIEGO UNIFIED PORT DISTRICT,
Respondents.

Brief of Respondent States Steamship Company In Opposition to Petition for Writ of Certiorari

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In the Supreme Court

of the

United States

OCTOBER TERM 1968

No. 525

MATSON NAVIGATION COMPANY, *Petitioner,*

vs.

C. R. SMITH (SUCCESSOR), SECRETARY OF COMMERCE, STATES STEAMSHIP COMPANY, and SAN DIEGO UNIFIED PORT DISTRICT, *Respondents.*

Brief of Respondent States Steamship Company In Opposition to Petition for Writ of Certiorari

This respondent, States Steamship Company (States) does not dispute that this Court has jurisdiction and the petition is timely.

I.

OPINIONS BELOW

Matson Navigation Company's (Matson's) recitations in this regard do not clearly reflect the tortuous course of this proceeding as it has come before eight decision makers during the

seven and a half-year period since States' application was filed. There have been five agency decisions and three judicial decisions.[1] All of the decisions (except two superseded agency decisions) have supported States' application in full.

States filed its application with the agency on February 2, 1961 under Section 805(a) of the Merchant Marine Act, 1936, as amended (the Act) to increase its intermediate calls in domestic service between California and Hawaii from 13 to 26 per year in each direction (SA1).

The recommended decision of the Hearing Examiner of March 11, 1963, denied the application in general, but granted the service as between San Diego and Hawaii.

The decision of the Maritime Subsidy Board (Board) of November 27, 1963, granted States' application in full. The Board rejected the Hearing Examiner's recommendations and adopted his findings and conclusions only to the extent consistent with the Board's decision. The Board's decision appears in App. B, *infra*, pp. 41-66.

The matter was then reviewed by Secretary of Commerce Hodges pursuant to Department of Commerce Order 117 (Revised) 27 Fed. Reg. 7687. The Opinion and Order of Secretary of Commerce Hodges of April 23, 1964 in effect denied States'

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1. To maintain uniformity, record references in this brief will be designated in the same manner as selected by petitioner in its brief (p. 4, n. 1). The record references to the 8 decisions referred to follow in chronological order: (1) Recommended Decision of Hearing Examiner C. W. Robinson dated March 11, 1963 (SA64 2 Pike & Fischer Shipping Regulation Reports 535 [hereinafter cited as "SRR"]); (2) Final Opinion and Order of the Maritime Subsidy Board dated November 27, 1963 (SA80, 3SRR215); (3) Opinion and Order of Secretary of Commerce Hodges dated April 23, 1964 (SA94, 1 MA 37); (4) Order for Remand of U.S. District Court for the District of Columbia dated December 30, 1964 (SD9); (5) Recommended Decision of Review Examiner E. Robert Seaver dated March 1, 1965 (SD30, 5SRR799); (6) Opinion and Order of Secretary of Commerce Connor dated July 6, 1965 (SD69, 5SRR1111); (7) Memorandum Opinion and Order of U.S. District Judge Wollenberg dated August 10, 1966 (R 740-66a, 258 F.Supp. 144); and (8) the *per curiam* opinion of the court of appeals reported at 394 F.2d 514.

application, but granted States conditional permission to provide service from California to Hawaii.

States filed a complaint with the district court in the District of Columbia for judicial review of Secretary of Commerce Hodges' decision in accordance with Section 11 of the Administrative Procedure Act (5 U.S.C. §§ 702, 706). The first of the three judicial decisions in this case was the order of the district court remanding the case to the Secretary of Commerce (SD9).

For reasons set forth in his affidavit to the district court requesting remand (SD6), Secretary of Commerce Hodges upon remand, on January 4, 1965, set aside his decision, declared it void, and directed a further review by a Review Examiner under a special procedure (SD11). All parties concurred by stipulation.[2]

In response to the request of Secretary Hodges, E. Robert Seaver, Esq., a former General Counsel of the Federal Maritime Board, was selected by the Civil Service Commission and the Secretary appointed him Review Examiner (SD13). Among other instructions directed to the Review Examiner was one that the vacated decision of Secretary of Commerce Hodges "is not a precedent or authority in the further review of this case, and references in future argument, oral or written, to that decision are not to be permitted at any stage of this review" (SD14, p. 2.).

The Review Examiner issued his Recommended Decision on March 1, 1964. The Review Examiner concluded that permission is not required under Section 805(a), but that in the event permission is required, the application should be granted in full (App. A, *infra*, pp. 1-40).

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2. The Secretary requested the U.S. Civil Service Commission to select a "well qualified hearing examiner to assist the Secretary to review the decision of the Maritime Subsidy Board. . . ." It was pointed out "that it is important to select an examiner of very superior ability for this assignment" and it was emphasized that "a knowledge of the provisions of the Merchant Marine Act of 1936, as amended, relating to subsidies would be very helpful" (SD12).

Secretary of Commerce Connor (successor to Secretary Hodges) issued his opinion and order on July 6, 1965. This is the agency decision attacked by Matson. It granted States' application in full (Matson Brief, App. C., p. 28). Reconsideration was denied on August 23, 1965 (SD78). Thus, the agency itself has obliterated its two decisions which did not favor full grant of States' application. Four and a half years after filing its application States commenced its increased and extended Hawaii service so authorized.

The second judicial decision is that of the District Court for the Northern District of California following the decision of Secretary of Commerce Connor which affirmed the Secretary's decision granting States' application on Matson's complaint for judicial review (Matson Brief, App. B, p. 3). The third judicial decision was that of the court of appeals which affirmed the judgment of the district court. The court of appeals denied Matson's petition for rehearing (Matson Brief, App. A, p. 1).

Thus, the Secretarial review by and decision of Secretary of Commerce Connor, and judicial review by the courts below, have left undisturbed consistent findings and conclusions of the Board and the Review Examiner with which Secretary of Commerce Connor did not expressly disagree.

II.

QUESTIONS PRESENTED

Since the decisions of the courts below were rendered in an action for judicial review of the agency decision of Secretary Connor, it is appropriate to note the issues described by him for decision (Matson, App. B, p. 32): These issues are:

> a. Does section 805(a) of the Act require States to obtain written permission in order to engage, as proposed, in the domestic trade and, at the same time, receive operating-differential subsidy?

b. If the answer to the above issue is "yes," does Matson operate exclusively in the domestic service so as to be entitled to protection under 805(a) against the grant of an application that would result in unfair competition to such an operator?

c. If the answers to the above issues are "yes," would approval of States' application result in unfair competition to Matson, within the meaning of section 805(a)?

d. If the answer to the issue stated first above is "yes," would approval of States' application be prejudicial to the objects and policy of the Act within the meaning of section 805(a)?

The Secretary answered issue (a) "yes," States did need section 805(a) approval of its increased service (Matson, App. C, pp. 32-46). He answered issue (b) "yes," Matson was an exclusively domestic operator entitled to section 805(a) protection against unfair competition (Matson, App. C, pp. 46-51). Matson naturally accepts these decisions.[3]

Matson challenges the Secretary's answers to issues (c) and (d). The Secretary resolved both issues (c) and (d) against Matson. He found that granting States' application would not result in unfair competition to any exclusively domestic operator (Matson, App. C, pp. 52-68) and that grant of States' application would not result in prejudice to the objects and policy of the Act (Matson, App. C, pp. 68-83).

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3. Notwithstanding the rulings below, States has consistently argued and still contends that (a) Section 805(a) of the Act does not require States to obtain the written consent of the Secretary to operate in the domestic trades authorized by, and subject to the subsidy reduction and refund provided in Sections 506 and 605(a) of the Act; (b) or alternatively, that the subsidy proration provisions of those sections eliminated, as a matter of law, any claim of unfair competition, and (c) Matson, as the corporate parent of Oceanic Steamship Company, a subsidized operator and, by virtue of certain non-domestic operations, is not qualified for protection against unfair competition as a carrier "operating exclusively in coastwise or intercoastal service," within the meaning of Section 805(a). Such grounds would constitute additional reasons to sustain the decisions below.

Matson's questions for consideration appear at pp. 2-3. The principal challenge appears to be based on grounds that the findings of the Secretary are not supported by substantial evidence. A subsidiary ground is that the Secretary's decision is not consistent with law. The only question presented, however, is whether the courts below acted in accordance with the decisions of this Court by limiting the scope of their review of the Secretary's determinations to whether such determinations had a reasonable basis in law and were supported by substantial evidence.

In particular, the questions are:

1. Whether the Secretary's decision, including the "substantial competitive advantage" standard adopted by the Secretary and as approved by the courts below has a reasonable basis in law.

2. Whether the courts below erred in finding that the Secretary's decision is supported by substantial evidence.

III.

STATUTES INVOLVED

In addition to Section 805(a) of the Act, (49 Stat. 2012, as amended, 46 U.S.C. Sec. 1223 (a); Matson, App. D, p. 86); this case is directly concerned with Section 101 of the Act, (49 Stat. 1985, 4 U.S.C. Sec. 1101), Section 506 (49 Stat. 1999, as amended, 46 U.S.C. Sec. 1156), and Section 605(a) (49 Stat. 2003, as amended, 46 U.S.C. 1175). The texts of Sections 101, 506 and 605(a) are set forth at Appendix C, *infra*, pp. 67-68.

IV.

STATEMENT

Matson's "Statement" (pp. 3-12) cannot be left unchallenged. It asserts unwarranted conclusions instead of facts in many vital respects and fails to put its contentions in the proper perspective to permit the Court to appraise the same.

States, with its predecessors and affiliates, has owned and operated vessels in world-wide shipping operations, mostly trans-Pacific, for approximately 47 years (STr. 217-20, 279-80). Since 1957 and presently, its trans-Pacific services have been and are conducted under an Operating-Differential Subsidy (ODS) Agreement (SC9, 10) with the United States Government covering foreign commerce on Trade Route 29 (U.S. Pacific Coast/Far East) (SC107, p. 20).

In 1950, vessels of a predecessor company, Pacific Transport Lines (PTL) commenced making intermediate calls at Hawaii on trans-Pacific voyages between California and the Far East, discharging domestic cargo and loading foreign cargo, outbound, and reversing the process inbound to California. In 1952, anticipating award to it of an ODS contract, PTL applied under section 805(a) of the Act for permission to continue its Hawaii domestic service after the subsidy award. Such permission was granted[4] after the ODS contract was executed on December 31, 1952. The application and the permission involved 13 intermediate calls at Hawaii per year in each direction.[5]

The nature of States' service to Hawaii is of particular significance respecting the questions presented. Intermediate calls or stops are made at Hawaii by States' vessels on trans-Pacific voyages from California to the Far East and return. On such a round trans-Pacific voyage the vessel loads cargo at California ports for Hawaii and the Far East, usually at the same terminal and often simultaneously. The vessel then sails westbound from San Francisco carrying cargo destined for both Hawaii and the Far East in foreign trade. Only a minor deviation is involved for

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4. *Pacific Transport Lines, Inc.—Subsidy, Route 29*, 4 FMB 7 (1952).

5. When PTL was merged with States in 1957 such permission was transferred to States (STr. 223-24). Since that time all of States' services have been conducted under a single ODS agreement. Although vessels in States' services were permitted calls at Hawaii in States' ODS contract on all voyages, calls for domestic cargo purposes were required to accord with the Section 805(a) permission (SC9, pp. 6-8).

the Hawaii call in respect to the course it would otherwise maintain on trans-Pacific voyages. The domestic cargo is unloaded in Honolulu and in the space thus made free, available foreign cargo, destined for the Far East is loaded. The vessel then sails from Honolulu for the Far East. On the return leg of the round voyage, the vessel loads cargo in the Far East destined for both California and Hawaii and makes an intermediate call at Hawaii enroute to California. At Honolulu the vessel discharges the foreign cargo from the Far East and, in the space thus vacated, loads domestic cargo destined for California (SA64, p. 7; STr. 216, 242-44, 248-50, 450-53).

Thus these intermediate calls by States' vessels at Hawaii are dual-purpose and in each direction space is utilized twice. The cargo moving in either direction between California and Hawaii is in domestic commerce. But at the same time cargo in foreign commerce, moving between California and the Far East, is also aboard in this California-Hawaii segment. This is the "mixed" segment of the round voyage. The cargo moving in both directions between Hawaii and the Far East is also in foreign commerce.

Under the Act, provision is made to subsidize U.S.-flag liner operators engaged in the foreign commerce of the United States (46 USC Secs. 1151-1161, 1171-82). These subsidies are designed to eliminate the disadvantage to American operators vis-a-vis their low cost foreign competitors with respect to the cost of constructing vessels and in operating such vessels, especially with respect to crew wages.

As indicated, States is so subsidized and receives construction-differential subsidy (CDS) with respect to construction of new vessels and operating-differential subsidy (ODS) with respect to vessel operations in the foreign commerce of the United States.[6]

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6. More detailed explanation of the purpose and nature of ODS is contained in the Recommended Decision of the Review Examiner (App. A, pp. 10-11, *infra.*)

It is not the policy of the United States to subsidize operations in the domestic trades since foreign lines are not permitted to engage in such carriage. However, it is not the policy of the United States to foreclose U.S.-flag operators from engaging in domestic trades, even though they may be subsidized with respect to their services in foreign trades. In fact, the contrary is true. The Act (Sections 506 and 605(a)) prohibits payment of subsidy in respect of operations in the domestic trades generally but authorizes limited domestic operations in four specific cases, each of which applies to a voyage in mixed foreign and domestic trade. One of such specific exceptions, involved here, is a "voyage in foreign trade on which the vessel may stop at the State of Hawaii."

Sections 506 and 605(a) provide formulae for reducing and refunding subsidy when a subsidized carrier does engage in domestic trades in one of the four specific instances described above.[7]

The subsidy refund formulae are designed by Congress to eliminate the benefits of subsidy as far as domestic operations are concerned. These provisions of law, would, of course, be meaningless if it were not the policy of the United States to permit subsidized operators to engage in the four specific mixed foreign and domestic trades. In other words, Congress has anticipated the desirability of operators engaging in such mixed trades and has expressly imposed conditions which call for reduction and refund of subsidy to eliminate the advantage in domestic operations which would otherwise be present.

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7. Under Section 605(a) ODS may be paid for a voyage on one of the mixed foreign and domestic trades, but the subsidy payment is reduced by "an amount which bears the same ratio to the subsidy otherwise payable as such (domestic)" gross revenue bears to the gross revenue derived from the entire voyage."

To be eligible for ODS a vessel must be built in an American shipyard (46 U.S.C. Sec. 1171(a)). Under Section 506, pursuant to a statutory formula similar to that prescribed by Section 605(a), CDS, although paid directly to the American shipyard must be refunded to the Government by the shipowner if and when the vessel is operated in one of the authorized mixed foreign and domestic trades and gross revenue is derived therefrom."

In addition to the reduction of subsidy provided by Sections 605(a) and 506, Congress imposed an additional protection for exclusively domestic operators. Subsidized operators, before engaging in any domestic trade, directly or indirectly, must make appropriate application and receive written permission of the Maritime Subsidy Board. Section 805(a) provides that the Board shall not approve the application if it finds that doing so will either (1) result in unfair competition to any one operating exclusively in domestic service or (2) be prejudicial to the objects and policy of the Act.

In the decision under review the Secretary of Commerce considered whether grant of States' application would result in "unfair competition" to an exclusively domestic operator in the relevant trade.

The Secretary noted that none of the decisions which preceded his own had found that grant of States' application "would result in competing fraudulently, in a cutthroat manner, or in a way that is unfair according to applicable legal or ethical standards." He found no such common law varieties of unfair competition to exist in this case. Thus, specifically eliminated as grounds for denial of the application were such claims that States would engage in "cream-skimming," or that it would engage in cutthroat competition by rate cutting or by fixing rates below cost and by using profits of the subsidized operations to carry the loss or otherwise. (Matson, App. C, pp. 56-57, 73-74). The courts below agreed (Matson, App. B, pp. 23-24).

The Secretary concluded no unfair competition to Matson would result from grant of the application. The Secretary of Commerce considered whether States would have some residual subsidy benefit in respect to its proposed service. In defining unfair competition in this mixed voyage situation he adopted the standard of "substantial competitive advantage." This principle contemplates the agency will consider all the surrounding competitive circumstances pertinent to the impact of the proposed service upon oper-

ations of domestic operators. In other words, the Secretary contemplates that "substantial competitive advantage" is the equivalent of "unfair competition" (Matson, App. C, pp. 55-58). This standard was arrived at by the Secretary only after careful consideration of the unique situation presented in this case by the mixed foreign and domestic operations, the lack of any definition of "unfair competition" in the Act, but with due care paid to the purposes and objectives of the Act. The courts below agreed that this was an appropriate standard, the district court concluding:

> ". . . the standard of 'substantial competitive advantage' is the product of sound reason, administrative experience, appreciation of the complexities of the problem, and a thorough understanding of the statutory policies, which constitutes an allowable administrative policy judgment undisturbable on judicial review." (Matson, App. B, p. 18).

Under the "substantial competitive advantage" standard the Secretary considered the competitive setting—the relative competition which States would offer to Matson (Matson, App. C, pp. 58-59). The Secretary adopted findings showing Matson carries 98% of all Hawaii/Pacific Coast cargo and 95% of the liner cargo in the California/Hawaii trade and an even greater portion of all bulk cargo, concluding that Matson is, and has been for many years, by far the "predominant" carrier in the California/Hawaii trade (Matson, App. C, pp. 58-60). Matson's predominance in the trade was more accurately referred to by the Board as a "virtual monopoly" (App. B, Infra p. 63). After receiving the Secretary's findings in this connection and affirming the same as supported by substantial evidence, the district court also recognized Matson as a "near monopolist" and as having "a near monopolist's grip on the State of Hawaii" (Matson, App. B, pp. 19-21, 26).

The Secretary, following well-established precedent, refused to equate effective competition with unfair competition.

He found that the amount of domestic cargo that would be moved by States under its increased sailings would represent a

modest increase in effective competition by States but concluded that the small percentage of the cargo movement which States would carry would not constitute "substantial competition" (Matson App. C, p. 60). This was an additional factor considered in his finding that no unfair competition would result from grant of States' application. The courts below agreed this was a proper factor to be considered, noting that even if States proposed to carry substantial additional cargo, this would not be equivalent to a showing of substantial competitive advantage because of subsidy (Matson, App. B, pp. 20-21).

The Secretary gave full consideration to Matson's contentions that States' increased California/Hawaii service would be benefited to some extent by subsidy.

He first disposed of the major premise of Matson's opposition that States' competition would be intrinsically unfair in any case as its vessels probably would not be available for operation in any trade, foreign or domestic, were it not for the fact that its vessels are built and operated with subsidy assistance. He accepted the Board's findings that the subsidy reduction formulae abate subsidy advantage to "an important degree." The Secretary concluded the use of such vessels in mixed foreign and domestic trade as authorized by the Act, would not in and of itself make States chargeable with unfair competition (Matson, App. C, pp. 60-61).

The Secretary then considered the several tests advanced by Matson intended to demonstrate various advantages received by States from subsidy.

For example, Matson contended that under its calculations States is able to acquire new Mariners, which would be used partly in the domestic trade because of CDS, at substantially lesser cost than Matson. After adopting an equivalent basis for comparison and giving effect to the CDS refund formula, the Secretary found that the difference in cost was minimal (Matson, App. C, pp. 61-63). In connection with these findings the Secretary

also concluded after review of the legislative history of the Act that interest-free use of CDS was not intended by Congress to be an element of unfair competition (Matson, App. C, pp. 60-63). Also not considered to be an element of unfair competition was States' opportunity for tax deferment under the Act (Matson, App. C, pp. 63-64).

The Secretary then considered Matson's contentions that subsidy payments attributable to the domestic portions of its mixed foreign and domestic voyages during calls at Hawaii would exceed the subsidy reduction and refund as required by statutory formulae. The Secretary found Matson's claims of unremitted subsidy in this regard to be overstated. He recognized that the subsidy remaining after reduction and refund under the statutory formulae aided States in the carriage of *foreign* cargo during the California/Hawaii segment of the round voyage (Matson, App. C, pp. 64-65). Since States' vessels must traverse waters between California and the Far East, and on this segment the vessel is laden with both domestic and foreign cargo, it was both normal and necessary that under any attempted calculation some ODS should remain after the domestic trade reduction, to place States on a parity with its foreign-flag competitors.[8]

During the proceedings, Matson claimed that a vital question was whether States' proposed operations would be profitable. Early in the hearings States had shown that its proposed Hawaii service would be profitable. (STr. 6157). Since only a minor deviation is involved to add Hawaii as a port of call in the otherwise basic itinerary of its vessels, States evaluated the financial results of calling at this additional port by "incremental" accounting.

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8. States actually showed that the domestic trade reduction of ODS alone was excessive and that more subsidy was paid back than was attributable to the domestic portion under anyone's accounting theory (SA67, pp. 177-80). With dubious propriety Matson now claims (pp. 5-6) that States' subsidy support is $3,582,000 per year without explaining that this figure reflects both foreign and domestic operations and does not take into account subsidy reduction and refund under Sections 506 and 605(a).

States' projection demonstrated the increased profitability of both the foreign and domestic operations and the two combined, both before and after giving effect to subsidy refund to the Government of $1,179,976 (SC12, Item 10 (Rev.), p. 3). Neither the Secretary (Matson, App. C, p. 66), or the district court (Matson, App. B, pp. 21-23), or Matson (p. 14) dispute profitability on this basis.

Matson urged yet another accounting test designed to show subsidy benefits at the hearing. This test employed a full absorption basis of accounting. As contended by Matson, it purportedly showed that the domestic portion of States' mixed foreign and domestic sailings would be conducted at a loss. It was urged that this constituted the basis of an unfair advantage and should preclude granting of the application (Matson, App. C, pp. 65-67).

States disputed this conclusion as well as its factual basis. Both sides presented many demonstrations of the profitability of the unsegregated domestic operations of States' proposed mixed services using various, but accredited, accounting procedures. States' submissions included two analyses using a full absorption basis as well as the incremental approach (e.g., Matson, SC78-83; States, SC110, 112). The agency was therefore given a spread of assumed financial results based upon the various hypotheses employed by the accountants.

The Secretary gave full consideration to each approach, but accepted no single accounting approach as definitive (Matson, App. C, pp. 65-67). The decision of the district court, affirmed by the court of appeals, accepted the treatment given by the Secretary to this accounting issue and is predicated on the possibility that any one of the accounting presentations might prove to be correct (Matson, App. B, pp, 22-23). The Secretary agreed with the Board that the accounting controversy was not dispositive of the unfair competition issue (Matson, App. C, p. 67), a conclusion which the court below found to be "rational and supported by substantial evidence." (Matson, App. B, pp. 22-23).

The Secretary adopted the Board's conclusion that Sections 506 and 605 (a) "abate to an important degree" benefits derived from subsidy. Besides that he noted other equalizing forces that would prevent States from having an unfair advantage in this regard identifying the statutory and contractual restrictions upon subsidized operators and government aid to domestic operators (Matson, App. C, p. 67).[9]

In considering the impact of the grant of the application on Matson's cargo carryings, the Secretary refused to equate the modest increase in effective competition proposed by States with "unfair competition" in the light of projected growth in the trade and Matson's predominance in the trade as compared with States. (Matson, App. C, pp. 67-68).

The Secretary then turned to the question of whether granting States' application would result in "prejudice to the objects and policy of the Act" (Matson, App. C, pp. 68-83). After reciting the statutory objects and policy he noted "the concern here is whether the grant of States' application would be prejudicial to the development and maintenance of an adequate and well-balanced merchant marine, or prejudicial to the provision of ocean transportation services needed by the shippers and the geographic areas involved" (Matson, App. C, pp. 69-70).

The Secretary found that the California-Hawaii trade will grow enough to accommodate both Matson as the predominant carrier and States as a supplemental carrier. He rejected Matson's claims that States' additional service would cause either an increase in rates or curtailment of service by Matson. He emphasized his rejection of the contention that States would confine itself to "cream

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9. Matson is protected by the cabotage laws which insulate it and other American-flag operators from foreign competition (46 U.S.C. Sec. 883), and Matson has been aided by the so-called Section 511 funds (46 U.S.C. Sec. 1161) in the disposition and acquisition of its vessels, and the tax advantages accruing therefrom (SC87, note; STr. pp. 5500-01, 5505-10).

skimming" operations or rate cutting.[10] The Secretary concluded that in the light of these factors and Matson's pre-eminent position in the trade and shipper connections, that there would not be any "significant detrimental impact" on Matson (Matson, App. C, pp. 70-75, 77-78).

The Secretary saw considerable benefits to the objects and policies of the Act as the result of States' increased Hawaii calls. Matson operates a service very close to capacity and there was need for States' service to relieve inadequacy in Matson's "tight" service which appeared from time to time (Matson, App. C, pp. 73, 75-78). It would provide badly needed service between San Diego and Hawaii which Matson did not provide (Matson, App. C, p. 78). The courts below found a "definite need" exists for better service in the California to Hawaii trade (Matson, App. B, p. 25, n. 22). The Secretary also found that benefits to the foreign commerce would accrue from grant of the application (Matson, App. C, pp. 79-81). The courts below upheld "without hesitation" the Secretary's findings under Section 805(a) that granting of the application would not do prejudice to the objects and policy of the Act (Matson, App. B, p. 24).

As it has done here Matson attempted to convert its "benefits from subsidy argument" into a claim of unfair competition and prejudice to the objects and policy of the Act, on grounds that there is, prospectively, a "diversion" of subsidy in violation of the second paragraph of Section 805(a). The Secretary considered and rejected this claim (Matson, App. C, pp. 81-82). The courts below found the Secretary's disposition of this claim entirely consistent with the intent of Section 805(a) noting that it was designed to prevent deliberate shuffling of funds from subsidized operations, a circumstance not presented by "the unique mixed

10. The district court said: "He (the Secretary) had good reason and ample testimony to believe that States would continue to adhere to the dominant carrier principle of following Matson's rates (Matson, App. B, p. 23).

service situation specifically provided for in the Act by Sections 506 and 605(a)" (Matson, App. B, p. 17).

The Secretary, mindful of the purpose of the Act to accord substantial protection to exclusively domestic operators, provided for review of the competitive situation at the end of a reasonable period in the light of actual experience (Matson, App. C, pp. 68, 83-85).

V.

ARGUMENT

A. The Limited Scope of Review

The decision of this Court in *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607 (1966) emphasized that the courts of appeal, when reviewing agency actions, are bound by the substantial evidence rule. This Court noted that whether the court of appeals would have reached the same result as the agency is immaterial when the agency's action has a reasonable basis in law and is supported by the whole record. Thus, the "deference" accorded the agency's decision by the court of appeals on judicial review is required by *Consolo*.[11]

The decisions of the courts below that the determinations of the Secretary have a reasonable basis in law and are supported by substantial evidence dispose of all issues raised anew by Matson's petition. A substantial question for review is not presented to this Court when, as in this instance, petitioner merely seeks review of disputed evidence and specific facts all of which have been resolved during the lengthy course of the several agency procedings and by the courts below, contrary to petitioner's views.

In an effort to fashion a question of law to support its petition, Matson argues that the Secretary was required by law to give exclusive consideration to its accounting version of the profitability of States' Hawaii service, and that he and the courts below erred in not remanding the Secretary's decision for this and related

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11. A principle followed also in *Illinois C. R. Co. v. Norfolk and Western R. Co.*, 385 U.S. 57, 69 (1966); *Minneapolis & St. Louis R. Co. v. United States*, 361 U.S. 173, 189 (1959).

reasons. A finding which the Secretary did not make, that States would receive subsidy support for its Hawaii service becomes the fictional predicate for much of Matson's claim that the Secretary's decision is not in accordance with law. Essentially, Matson's argument on the law is to the effect that the Secretary applied the wrong standard.

As the district court observed, a reviewing court must guard against the danger of "sliding unconciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). All that is needed to support the Secretary's interpretation of the Act is that it has warrant in the record and a reasonable basis in law. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Commission v. Aragon*, 329 U.S. 143, 153-54 (1946).

The courts below gave extensive, meticulous consideration to their responsibilities on review, the district court giving particular attention to the standard adopted by the Secretary (Matson, App. B, pp. 8-18). The courts below unequivocally endorsed the Secretary's decision as supported by substantial evidence, within authorized agency discretion and in accordance with law. This was no grudging affirmance. Indeed, the district court praised the Secretary's opinion "for its clarity, documentation and thoroughness" (Matson, App. B, p. 27 n. 23). Therefore, Matson must sustain the heavy burden of attacking not only the Secretary's order but also judicial affirmance thereof.[12]

B. The Secretary's Order and Opinion Is Consistent with Section 805(a)

Matson reargues its version of the legislative history of Section 805(a) which it presented before the agency and the courts below. By a highly selective interpretation Matson asserts Section 805(a) was intended to provide absolute protection and promotion of

12. *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 207 (1947); *American Trucking Ass'n, Inc. v. United States*, 334 U.S. 298, 314 (1953); *Cardillo v. Liberty Metal Co.*, 330 U.S. 469, 477-479 (1947).

exclusively domestic operators with the startling conclusion that a subsidized operator "had no place in" the domestic service as against unsubsidized American flag operations (pp. 16-17).

Section 101 of the Act declares it to be the policy of the United States to foster and encourage a Merchant Marine sufficient to carry its domestic waterborne commerce and a substantial portion of United States foreign commerce. The Secretary and the district court rejected Matson's claim that the subsidized operator had no place in domestic commerce. The court pointed out that "nowhere in Section 101 of the Act is there any suggestion of a policy against American-flag vessels promoting both the foreign and domestic commerce of the United States on the same voyage." He added that in fact Congress expressly showed its awareness of these objectives obtained through mixed foreign and domestic voyages provided the operators complied with the subsidy reduction and refund formulae (Matson, App. B, pp. 10, 14-15).

Many of Matson's omissions and distortions in its previous presentation of legislative history were corrected by the district court. The district court, for example, noted that the abuses of mail subsidy which Congress sought to preclude under the new subsidy system provided by the Act were most common in two types of operations, neither of which related to intermediate calls at Hawaii by vessels on trans-Pacific voyages in the foreign trade (Matson, App. B, pp. 12-13),[13] although Matson in its brief, suggests to the contrary.

The district court also recognized that the promotion of both foreign and domestic commerce of the United States was intended by Congress to be accomplished as an object of the Act by subsi-

13. e.g., the piping off of subsidy funds by a subsidized contractor to separate affiliated corporations engaged in domestic trade or the receipt of subsidy funds by almost exclusively domestic operators because they happened to touch at a foreign port incident to their domestic service (Matson, App. B, pp. 12-13).

dized vessels on the same voyage in the four mixed foreign and domestic trades specified in sections 506 and 605(a) even though competition with exclusively domestic operators might result (Matson, App. B, pp. 10, 14-16). Matson would have this court mistakenly believe that Congress authorized such mixed foreign and domestic trading by subsidized vessels only where "there were no exclusively domestic services" (p. 20).

Congress contemplated that it would be in the public interest for subsidized carriers to provide mixed service in those trades in some cases, an intention recognized by the Secretary (Matson, App. C, p. 83). The court agreed and stated that it was even foreseen at the Congressional hearings that proration might not always remove all benefits of subsidy to an operator of a mixed foreign and domestic service in competition with an unsubsidized operator in the domestic trade (Matson, App. B, pp. 14-15, and fn. 12). Section 805(a) adds the further requirement that such calls may not result in unfair competition to exclusively domestic operators. Thus, the district court stated the exclusive domestic operator is given "double protection" from the subsidized operator (Matson, App. B, p. 10).

Matson has argued from the language of an amendment to S. 2582 introduced prior to enactment of the 1936 Act that is said to have "provided an absolute prohibition against domestic operations by subsidized operators" (p. 18). Matson's version of the legislative history fails to disclose that at the time the amendment was proposed, S. 2582, then before the Senate, authorized subsidized vessels to engage in specific mixed foreign and domestic trades and required reduction and refund of subsidy. These sections were not affected by the proposed amendment: (Sections 504 and 507(d) of S. 2582 found in Senate Committee on Commerce, Hearings on S. 2582, 74th Cong. 1st Sess. pp. 6-9, 158-59, 188-89 (1935), described by the Review Examiner) (App.

A, pp. 18-20, *infra*).[14] Moreover, as the district court noted, neither this amendment nor the companion amendment proposed in the House were retained in H.R. 8555 which became law (Matson, App. B, pp. 15-16, n. 13). On June 19, 1936, the very day a compromise bill, which included authorization for mixed foreign and domestic voyages subject to subsidy proration provisions, as well as the present version of Section 805(a), was finally passed by the Senate, the proponent of the amendment expressed his satisfaction with the bill (80 Cong. Rec., 74th Cong. 2nd Sess. p. 10101 (1936).

The "anti-diversion" paragraph of Section 805(a) does not, as Matson argues (p. 20), prescribe any additional barrier to the grant of States' application. Matson forgets that Congress authorized mixed foreign and domestic voyages with an intermediate Hawaii call, conditioned upon subsidy reduction and refund. Subsidy proration is imposed for the very purpose of extracting subsidy support for domestic operations. Even so, the district court noted, there remains the possibility of some residual subsidy benefit without purposeful diversion, a matter which the Secretary quite properly regarded as a potential "unfair competition" claim (Matson, App. B, pp. 16-17). The second paragraph of Section 805(a) is concerned, not with residual subsidy benefit which may remain after proration, but with the deliberate "shuffling" of funds from subsidized to unsubsidized domestic operations, as the district court observed. Indeed, the legislative history indicates that Congress was primarily concerned with the deliberate and devious misdirection of mail subsidy to what were separate domestic operations. It is this purposeful shuffling of funds which is subject to the criminal penalties of Section 805(a). No claim has been made in this case that such has or is likely to occur.

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14. The prohibitory language of the amendment dealt with the domestic intercoastal or coastwise service "whereas at this time Section 1010 of S.2582 included in the definition of "foreign trade," calls at a "territory or possession" (e.g. Hawaii), if such calls were made as an "intermediate stop on what would otherwise be a voyage in foreign trade" (Ibid., p. 17).

In sum, the objective of Matson's misconceived legislative history is to resuscitate the judicially discarded notion that subsidized operators are prohibited from competing in the domestic trades on the basis that domestic operators are "fundamentally entitled" to carry all the cargo in the domestic trades they are able to carry.

C. There Is No Conflict Between Decisions of the Court of Appeals

Matson's first ground for the grant of certiorari is a supposed conflict between the decision of the court of appeals below and two other courts of appeal cases dealing with Section 805(a) (p. 13). Both cases mention the "anti-diversion" language of Section 805(a) but not in the context of mixed foreign and domestic operations authorized under Section 506 and 605(a) and as to which subsidy is prorated. They are not in conflict with the decision below.

The first such case, *Seatrain Lines v. Hodges,* 320 F.2d 737, 740 (D.C. Cir. 1963), deals with issues and facts wholly unrelated to this case. There, Waterman Steamship Corporation had received, after hearings, written permission under Section 805(a) to continue its affiliations with two subsidiaries engaged in the domestic trade. Some time later, Waterman proposed a corporate reorganization directed at divorcing or removing the affiliation between it and its domestic subsidiaries. The Maritime Subsidy Board determined administratively the reorganization would accomplish Waterman's disaffiliation, so far as Section 805(a) was concerned. This decision was upheld by the Secretary of Commerce.

Seatrain challenged this administrative determination, the only issue before the court being whether 805(a) requires hearings when the Board passes upon the question of affiliation (320 F.2d at 740). The court ruled that Seatrain was not entitled to a hearing on this issue since the Board's action was in the nature of an "advisory opinion" only. The court of appeals noted that:

"If the subsidized carrier had incorrectly appraised the legal character of its affiliation and if any assets used in foreign operations are diverted into domestic operation, the carrier is subject to prosecution" (320 F.2d at 741).

This decision offers no support whatever for the proposition the agency must make a finding respecting the likelihood of commission of a criminal act as a third pre-condition to the grant of permission under Section 805(a).

A similar reference to the concluding paragraph of Section 805(a) is also made, citing *Pacific Far East Line, Inc. v. F.M.B.*, 275 F.2d 184, 186 (D.C. Cir. 1960) *cert. denied*, 363 U.S. 827. There the court adopted the position that competition is not "unfair" when it does not involve diversion of money to a separate domestic service from subsidized foreign operations to the disadvantage of an unsubsidized operator. The Secretary quite consciously utilized a consistent standard in the present case in adopting the substantial competitive advantage test. He applied this standard with the approval of the courts below to the mixed foreign and domestic service, with its attendant subsidy proration, extracting subsidy attributable to domestic operations (Matson, App. C, pp. 57-58; App. B, p. 17).

Noting, presumably, that the court of appeals in the *PFEL* case indicated that it might be deemed unfair to engage in "cut-throat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying substandard wages, or by using substandard wages, or otherwise" (184 F.2d at 186), Matson endeavored throughout this proceeding to paint an image of States engaging in cut-throat competition and relying on subsidy to support such practices. Matson was unable to prove this charge to the satisfaction of any of the eight decision makers hearing this case (Matson, App. C, pp. 56-57).

The courts below found good reason and ample testimony to support this conclusion (Matson, App. B, p. 23). The testimony showed and the Hearing Examiner, the Board and the Review

Examiner found that States' intended to follow Matson's rates, which can hardly constitute cutthroat competition (SA64, pp. 9, 23; Matson, App. C, pp. 56-57, 73-74; App. A, *infra*, p. 34) States has consistently followed Matson's rates and intends to continue to do so.[15]

D. The Secretary's Decision Is Not Inconsistent with Other Agency Decisions.

Matson cites nine agency decisions as purported examples of a long line of decisions standing for the proposition that Section 805(a) meticulously protects the domestic operator against "subsidized competition" by holding the same to be *prima facie* unfair competition and prejudicial to the objects and policy of the Act (pp. 21-23). But Matson fails to inform the court (1) that at the time most of those decisions were rendered (most involving unsubsidized vessels) the agency was following the principle, subsequently discarded in *PFEL*, that domestic operators were "fundamentally entitled" to all available cargo in the domestic trade, and (2) that such doctrine has been completely repudiated and abandoned.[16]

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15. Matson was unable to show that States' rate level was lower than Matson at any time except during a hiatus during which Matson's successive rate increases were being vigorously contested by the State of Hawaii and others before the Federal Maritime Commission (Tr. 312-19). In 1959, August, 1961, and in the Fall of 1961, Matson raised its rates by 12½%, 10% and 9.8%, respectively. After an adverse ruling by the Examiner of the Federal Maritime Commission in *Matson Navigation Co. —Hawaiian Rate Case*, 1 SRR 349 (1962) Matson rolled back its rates to the level obtaining in August, 1961. States, before and since has continued to follow the rates charged by Matson in consequence of the dominant carrier principle of rate-making recognized by the Federal Maritime Commission. *Matson Navigation Company—Rate Structure*, 3 USMC 82, 83 (1948), and *Hawaiian Rate Case, supra*. at 355.

16. *American President Lines—Unsubsidized Operation Route 17*, 3 FMB-MA 457, 470 (1951); *American President Lines, Ltd., Section 805(a) Application*, 4 FMB-MA 436, 440 (1954); *American President Lines, Ltd.—Subsidy Route 17*, 4 FMB-MA 488, 504 (1954); *T. J. McCarthy Steamship Co.—Sec. 805(a) Application*, 5 FMB 666 (1959); *Waterman S.S. Corp.—Sec. 805(a) Application*, 6 FMB 115 (1960), and *Pacific Far East Line, Inc.—Sec. 805(a) Applications*, 4 FMB 580 (1955).

The court of appeals in the *PFEL* case condemned the fundamental entitlement doctrine, holding:

> "However adequate Matson's service may be, and in whatever sense Matson may need to retain its monopoly of the California-Hawaii trade, we cannot accept the Board's view that Matson is 'fundamentally entitled' to retain this monopoly against a competitor that is subsidized as Matson itself is, through its subsidiary Oceanic—in a different trade." (275 F.2d at 186).

The Board and its predecessors subsequently made clear that such doctrine of fundamental entitlement would no longer be followed.[17] This was emphatically reaffirmed by the Board in the present case (App. B, *infra*, pp. 14, 19-20) and by the Secretary (Matson, App. C, pp. 55-56). The district court below agreed (Matson, App. B., p. 16).

Matson also relies on Secretary of Commerce Hodges' decisions in *American Export Lines, Inc., Puerto Rico Service*, 1 MA 285 (1964) and *Grace Line, Inc., Application to Call at Puerto Rico*, 1 MA 284 (1964). Both cases depend entirely on Secretary Hodges' voided opinion in this case (SD11, SD 14, p. 2). They obviously can not have any authority here.[18]

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17. *States Marine Lines, Inc.—Sec. 805(a), Application Docket S-57* (Sub No. 5, 7 FMB 378, 1 SRR 325 (1961); *American Export Lines, Inc., Application Docket S-134*, 1 SRR 919 (1962); *States Steamship Company—Hawaiian Outbound Calls, Docket S-128*, 1 SRR 599 (1961).

18. As explained earlier, Secretary Hodges vacated and set aside his opinion in the *States* case and established special procedures by which the *States* case could be reviewed again. The Review Examiner was instructed that it was "not a precedent or authority for the further review of this case and references in future argument, oral or written, to that decision as precedent or authority are not to be permitted at any stage of this review" (S.D. 14, p. 2). The *Grace Line* case was issued the same day and appended to Secretary Hodges vacated opinion in the *States* case. The *American Export* decision followed one week later. The entire legal basis for his opinions in the *Grace Line* and *American Export* cases was predicated upon his 10 page opinion in the *States* case which was vacated on January 4, 1965. Thus, Matson's reliance upon Secretary Hodges' vacated opinion in the *States* case (p. 11) or the collapsed status of the *Grace Line* and *American Export* cases (p. 21) is misplaced.

Matson claims *Pacific Far East Line, Inc.—Section 805(a) Applications,* 4 FMB 580 (1955), as inconsistent with this decision. In that case an application for a subsidized operator to act as agent for an affiliated coastwide operator was denied as being contrary to the objects and policy of the Act, principally on grounds of the subsequently discarded "fundamental entitlement" theory. The agency was unable to consider a claim that performance by PFEL of its services would give its domestic affiliate a financial advantage because the applicant had failed to furnish competent evidence in this regard (p. 591). By contrast, extensive financial evidence was received and considered in the present case to determine the unfair competition and objects and policy of the Act issues.

Matson's claims (pp. 29-31) of subsequent chaotic administration of Section 805(a), following the court of appeals decision in *PFEL,* are without merit. Matson cites the *American Export Lines* and *Grace Line* cases which, as shown, were based on the voided authority of Secretary of Commerce Hodges' opinion and order. The Board's decision in *American Export Isbrandtsen Lines, Inc.—Section 805(a) Application,* 9 SRR 997 (1968) is not inconsistent with the Secretary's decision here under review. The Board was there dealing with a new situation where, by virtue of the Board-approved terms of a corporate reorganization, the operations of an affiliate engaged in domestic service were financially insulated from subsidized foreign operations. The Board carefully distinguished prior cases involving use by ODS contractors of subsidized or unsubsidized vessels in either the mixed foreign and domestic or with vessels of affiliated companies in the domestic trades and the possible impact of subsidy thereon without the insulation present in that case (9 SRR at 1003). The Board, too, consistent with the *PFEL* case, once again rejected the doctrine of "fundamental entitlement" in considering whether prejudice to the objects and policies of the Act would occur. (9 SRR 1004).

The fears which Matson expresses based upon the record in an unresolved case pending before the Board, (p. 30) concerning new competition in the California/Hawaii trade, must be measured against the fact that for many years Matson has retained its monopoly against other carriers which have unsuccessfully attempted to enter this trade (Matson, App. C, p. 59). Surely, our fiftieth State is entitled to competitive service, particularly when existing service has been shown to be insufficient for shipper needs. As the courts below observed, unsubsidized carriers have little occasion from this case to fear any sudden intrusion into their trade by subsidized operators (Matson, App. B, p. 27).

E. The Secretary's Determinations Are in Accordance with Law and Are Supported by the Record

As we have seen, Matson resorted to raising every possible detrimental effect which might follow grant of the additional 13 calls (Matson, App. B, p. 25). Included in these efforts were a variety of accounting presentations designed to show benefits from subsidy.

Matson selects one of the accounting presentations for consideration here. It asserts that Section 805(a) requires the profitability of the domestic operation be determined in a mixed voyage situation to gauge the dimension of subsidy support adding that this requires the test of full absorption accounting (p. 27).

The Secretary had before him a spread of possible financial results of States' domestic Hawaii operation, utilizing both incremental and full absorption accounting submitted by both parties, based upon (the district court found) "modern accounting practice" (Matson, App. B, p. 22). All were considered by the Secretary but he concluded that no single approach was definitive after explaining the various cost allocations considered (Matson, App. C, pp. 66-67). The Secretary made it clear that any finding of unprofitability on Matson's theories is not "automatically

dispositive of the case" (Matson, App. C, p. 67). The Board had emphasized that this is only one factor to be weighed and is not controlling as a matter of law. "There is no law, of which we are aware," said the Board, "requiring that proposed service shall be approved only if it satisfies a full cost absorption theory" (App. B, *infra*, p. 55, n. 6).

Thus, full absorption accounting was specifically rejected by the Board and the Secretary as the exclusive test required by law to determine whether States' proposed service would result in unfair competition or prejudice to the objects and policy of the Act. Matson has cited no authority to the contrary.[19]

The refusal of the Secretary or the courts below to convert hypothetical projections into a specific finding is the gravamen of Matson's petition here. The decisions of the courts below are based on the possibility that any one of the accounting presentations could prove to be an accurate portrayal of profitability (Matson, App. B, pp. 22-23). The Secretary found that

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19. Matson has not substantiated its flat assertion (p. 28) that Section 805(a) "circumscribes" the agency in this regard. The rate-making cases Matson cites do not support a conclusion that its full cost absorption accounting approach is an exclusive test even in rate-making cases. In *American Lines v. Louisville & N.R. Co.*, 201 L.Ed. 2d 1289 (1968), this Court recognized that Section 15(a)(3) of the Interstate Commerce Act did not constitute a categorical command to use any particular accounting approach. The court made it clear that the regulatory agency has discretion to determine the appropriate approach to accounting problems, noting the courts are not particularly suited to pass on the merits of accounting arguments. 20 L.Ed. 2d 1301, n. 16. See, *Norfolk & W. Ry v. U.S.*, 287 U.S. 134 (277) (1932); *S.W. Elec. Power v. F.P.C.*, 304 F.2d 29, 42 (5th Cir. 1962); *Ark. Power & Light Co. v. F.P.C.*, 185 F.2d 751, 753 (D.C. Cir. 1950). Other cases Matson cites (pp. 25-26 in rate-making proceedings have only academic interest. *Northern Pacific Ry. Co. v. North Dakota*, 236 U.S. 585, is a rate-making case invoking the Fifth Amendment, holding that the public interest was no ground for forcing a common carrier to charge a rate which did not compensate a carrier beyond the additional costs incurred in transporting an additional commodity. *Government of Guam v. Federal Maritime Comm.*, 329 F.2d 251 (D.C. Cir. 1964) and *Alaska Steamship Co. v. F.M.C.*, 344 F.2d 810 (9th Cir. 1965) did no more than approve a proration of overhead expenses on the basis of voyage expenses without discussing full absorption techniques.

nowhere within the range of the maximum profitability and maximum loss reflected in the several accounting projections of States' proposed domestic service would there be either unfair competition or prejudice to the objects and policy of the Act, conclusions with which the courts below agreed. The short answer to Matson's contention is that the Board, Secretary and the courts made it perfectly clear that the result would have been the same, even had it been found that Matson's most enthusiastic "loss" projection had been the only correct one.

There is another answer to this contention. Matson claims (Matson Br., p. 14) unfair competition and "acts" prejudicial to the objects and policy of the Act irrespective of whether States' domestic Hawaii operations would be profitable or not. For in the Matson lexicon, the "benefits derived by States from subsidy"—(e. g., vessels constructed with the aid of CDS with attendant statutory interest and tax treatment and operated with the aid of ODS) would render States' application unapprovable under any accounting theory under its reincarnation of the discredited "fundamental entitlement" principle. In other words, under Matson's argument, States' application should be denied whether States' proposed operation would enjoy a profit or suffer a loss.

The confusion between some residual benefit from subsidy and shuffling of funds lies at the foundation of Matson's claim of a prospective diversion in violation of the second paragraph of Section 805(a). Congress has authorized subsidized vessels to participate in selected domestic trades under Sections 506 and 605(a) but required a refund and reduction of subsidy under its own formulae for the purpose of extracting subsidy benefits during such domestic trade participation. The subsidy that remains supports the foreign, not the domestic trade. It is not realistic to contemplate that Congress intended, even assuming some residual subsidy benefits remain after proration, that exclusively domestic operators are not to be exposed to fair competition by this authorized limited participation in domestic commerce.

The "substantial competitive advantage" standard is a rational test adopted by the Secretary to determine whether, for any reason, States would pose unfair competition to Matson. As the Secretary and courts below demonstrated, Congress prescribed no specifics for determining these issues (other than the provisions of 506 and 605(a) in the case of the authorized mixed foreign and domestic voyages).[20]

Moreover, the Secretary's standard also accords with that prescribed by the *PFEL* case:

> "The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California/Hawaii trade because it has a subsidy in the Far East trade." (275 F.2d at 186).

Using this as a guideline, the Secretary therefore quite properly measured the potential effects some residual benefits from subsidy States might have which would afford competitive advantage over Matson. It is immaterial whether States' contemplated operations would result in profit or loss unless in either case it would result in substantial competitive advantage. For example, if States had, with the aid of subsidy, proposed to engage in cutthroat rate-cutting practices intended to drive out exclusively domestic operators, an entirely different picture would be presented here. So also, if States should use its subsidized status to achieve a stranglehold over commercial shippers in the trade, or to create or perpetuate a monopoly displacing domestic operators in the trade. These are the indicia of "substantial competitive advantage." Even if States' competition were to be substantial, it would not be equivalent to unfair competition (Matson, App. B, p. 23).

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20. Of course the Secretary did give effect to these standards by finding the provisions of 506 and 605(a) "abate to an important degree" any benefit from subsidy (Matson, App. C., p. 67) and show Congress "contemplated it would be in the public interest for subsidized carriers to provide services in these trades in some cases" (Matson, App. C., p. 83).

Matson characterizes the Secretary's decision a "balancing exercise" evoking the false image of precisely weighted elements placed in a carefully calibrated scale. Even if this over-simplified interpretation is true, the Secretary carefully considered each element in respect to unfair competition, in the form of substantial competitive advantage, and under the objects and policy of the Act. Reliance by Matson on *United States v. Third Nat'l Bank*, 390 U.S. 171 (1968) is futile, for unlike that case, we do not have issues which are primarily legal but issues which are unquestionably for administrative determination and a decision which has a rational basis in law and findings amply supported by substantial evidence.

VI.

CONCLUSION

The proposed increase in States' domestic operations on its mixed foreign and domestic voyages is in the trades and in the manner expressly provided for by law. In order to avoid subsidization of domestic operations by operators who receive subsidy in their foreign operations, Congress prescribed explicit formulae to reduce and refund subsidy to prevent subsidy advantage in the domestic trade. Fearing shuffling of subsidy funds to domestic operations, Congress made such acts a crime. Even if these safeguards were not sufficient the agency under Section 805(a) will not grant permission to subsidized operators to enter the domestic trades if it finds unfair competition will result. As a final safeguard, permission will be refused if such operations will be contrary to the underlying objects and policy governing our merchant marine.

States has met and will continue to meet each of the foregoing requirements. States has met and surmounted each of the tests imposed by Sections 805(a), 506 and 605(a). With respect to unfair competition, the Secretary has refused to exhume the dis-

credited principle that exclusively domestic operators are "fundamentally entitled" to the domestic trade, and has substituted the principle of "substantial competitive advantage."

The Secretary has carefully considered all elements relevant to competition and has found that but a modest impact will be made upon Matson's monopoly by permitting States to participate in that trade; that States by virtue of its subsidized status, or otherwise, will not enjoy any unfair competitive advantage, nor will it compete by cream-skimming, cutthroat competition, rate-cutting, or in any other unfair manner.

In the area of the accounting issues all estimates and projections were carefully considered, including those which Matson urges. Nowhere within the range of accounting estimates did the Secretary find unfair competition would be created, or that the objects and policy of the Act would be prejudiced. The Secretary has found that not only would there be no prejudice to the objects and policy of the Act, but the same will be enhanced by grant of the application.

Every finding is supported by substantial evidence and by standards which are reasonable.

Matson's petition should be denied.

Respectfully submitted,

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October, 1968

Appendix A

Department of Commerce

Office of the Secretary

MARITIME SUBSIDY BOARD DOCKET NO. S-121

STATES STEAMSHIP COMPANY—
APPLICATION TO CALL AT HAWAII

Permission of the Maritime Subsidy Board under section 805(a) of the Merchant Marine Act, 1936, is not required where a subsidized operator in foreign trade wishes to make intermediate calls at Hawaii on the subsidized voyages, since sections 605(a) and 506 grant express permission for such mixed voyages and provide protection, deemed by Congress to be adequate, for exclusively domestic carriers through the pro-rata reduction and refund of subsidy for the domestic portion of the mixed voyage.

James L. Adams, Gordon L. Poole, and Edward M. Kovach for Applicant, States Steamship Company.

Herman Phleger, Alvin J. Rockwell, Willis R. Deming, George D. Rives, and John E. Sparks for intervenor, Matson Navigation Company.

John T. Rigby, Bert T. Kobayashi, Attorney General, Arthur S. K. Fong, Assistant Attorney General, and Richard S. Sasaki for Intervenor, The State of Hawaii.

Aaron W. Reese, Port Attorney, for Intervenor, San Diego Unified Port District.

RECOMMENDED DECISION OF E. ROBERT SEAVER, REVIEW EXAMINER

This is a review by the Secretary of Commerce, under section 7.01 of Department Order 117 (Revised), of the decision of the Maritime Subsidy Board (the Board) granting the request of States Steamship Company (States) for permission under section 805(a) of the Merchant Marine Act of 1936 (the Act) to increase its intermediate service between California and Hawaii from 13 to 26 calls per year in each direction on the sailings in its subsidized operations on Trade Route 29, between ports in California and the Far East.

States presently has the right and the obligation, under an operating differential subsidy contract with the Government, to make a minimum of 24 and maximum of 30 subsidized round voyages per year in its "B service" (between the Pacific Coast and the Far East) and a minimum of 24 and maximum of 28 in the "C service" (between California and the Far East). The contract presently permits calls at Hawaii on 13 voyages per year in the C service. States now desires to call at Hawaii fortnightly, rather than monthly, in each direction with its C service vessels, and wants the incidental right to fill in the schedule with B service vessels once or twice a year if this becomes necessary in order to make the 26 Hawaiian calls on a regular schedule. Six ships—Victories and C-3's—are used in the B service. Five are used at present in the C service consisting of Mariners and C-3's. If the request is granted, all the calls in the C service will be made by Mariners, which are among the world's fastest and largest cargo liners.

The plan, then, if the 13 additional calls may be made, is to provide service on each of the bi-weekly C-service voyages:

(1) From California ports to Hawaii in the off-shore domestic commerce,

(2) from California to Far East ports in the foreign commerce,
(3) from Hawaii to the Far East in the foreign commerce,
(4) from Far East ports to Hawaii in foreign commerce,
(5) from Far East to California in foreign commerce, and
(6) from Hawaii to California in domestic commerce.

The vessels employed in these services were built with the aid of construction subsidy provided by the Government under Title V of the Merchant Marine Act, 1936 (46 U.S.C. 1151 et seq.) and they are operated with the aid of an operating differential subsidy provided under Title VI of the Act (46 U.S.C. 1171, et seq.). However, the operating subsidy is eliminated and the construction subsidy refunded for the domestic phase of the voyages, on a pro-rata formula contained in sections 605(a) (46 U.S.C. 1175) and 506 (46 U.S.C. 1156), respectively, of the Act.

Matson Navigation Company (Matson), for many years the dominant carrier in the Pacific Coast/Hawaiian trade, intervened in the proceeding to resist the grant of permission. The State of Hawaii and the San Diego Unified Port District also intervened, the former objecting to the request and the latter supporting the request. Public Counsel took a position in opposition to the request, but they are not participating in this review.

The Procedural Events Leading to This Review

A protracted hearing was held before a Hearing Examiner of the Board pursuant to section 805(a) of the Act which, if applicable, requires a hearing before the requested permission may be granted and findings that the additional calls would not result in unfair competition to exclusively domestic operators or be prejudicial to the objects and policies of the Act. The Examiner issued a recommended decision that was favorable to Matson,

in most respects. It permitted the requested increase in calls from San Diego to Hawaii. It permitted the increased calls from the other California ports only on the condition that Matson should have the first refusal of all cargo, States to lift only that cargo that Matson could not lift within two weeks after a request for space by the shipper. It denied permission to increase the inbound calls from Hawaii. It may be noted here that Matson abandoned the San Diego service in 1960 because it felt that the cargo offered was insufficient to justify any calls. States has made a few calls at San Diego each year. Matson raised no objection to the grant of permission for the increased westbound calls at San Diego. All of the parties, including Public Counsel, filed exceptions to the recommended decision and the Board undertook to review the decision, as it was required to do under its rules.

The Board rejected the recommended decision of the Hearing Examiner and granted the requested permission, having found that the additional calls would not violate the standards of section 805(a). Matson and the State of Hawaii sought and obtained review of the Board's decision by the then Secretary of Commerce under section 7.01 of Department Order 117 (Revised). The unsuccessful parties brought an action in the District Court for the District of Columbia to obtain judicial review of the decision of the Secretary. The other parties intervened in support of the Secretary's decision. At that state of the proceeding, the then Secretary learned that certain *ex parte* communications had come before officials of the Department participating in the review of this case. He determined that, while innocently made, the communications might have prejudiced one or more of the parties.

Because of these communications, the former Secretary filed in the District Court a motion to remand the proceeding to the Secretary for the stated purpose of setting aside his own decision and designating a Review Examiner, outside the Department, to review the Board's decision and prepare a recommended decision

for the Secretary. The parties all consented to the motion and it was granted by the Court. Upon the request of the Secretary, the Civil Service Commission designated the undersigned, a Hearing Examiner of the Federal Maritime Commission, to serve as the Review Examiner in accordance with section 11 of the Administrative Procedure Act (5 U.S.C. 1010), and the Secretary appointed the Review Examiner. This review of the Board's decision is based on the record heretofore made in this proceeding, the briefs and arguments of counsel, and a few relatively minor matters stipulated by the parties at a "pre-review" conference.

It should be noted, particularly, that the then Secretary determined, with the agreement of the parties, that his decision was to be set aside and not cited nor considered as a precedent in the further proceeding in this case.

I. *The Principal Issue: Is Permission of the Agency Under Section 805(a) Required in Order for a Subsidized Operator to Engage in a Service Expressly Authorized by Sections 605(a) and 506 of the Act?*

The entire text of the three sections of the Act that are in question is as follows:

> SEC. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-

differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

SEC. 605 (a) No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* THAT such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the Great Lakes or on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade.

SEC. 805 (a) It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII

of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Sections 506 and 605(a) permit stops at Hawaii on voyages of the subsidized vessels in foreign trade. Interveners Matson and the State of Hawaii contend, in essence, that sections 605(a) and 506 must be read to mean that subsidies *may not* be contracted for as to the mixed foreign and domestic voyages permitted by these sections *unless* the contractor first receives permission for such calls from the Board under section 805(a), after an administrative hearing and favorable findings on the standards set out in that section. States urges that since sections 605(a) and 506 permit payment of subsidy on foreign voyages which include stops at Hawaii, permission under section 805(a) is not required for such voyages of the subsidized vessels. That section, they say, refers to voyages of other vessels of the contractor or his affiliates. A careful study of the Act and an appraisal of the intention of Congress lead to the conclusion that permission under section 805(a) is not required in the circumstances of this case.

Under the rule that, if possible, the legislative intent must be drawn from the plain meaning of the words used in the statute, the words "may be paid" in section 605(a) must be taken to mean what they say, rather than "may not be paid, unless - - -", as contended by Matson, unless a contrary Congressional intention is clearly evidenced by the language of section 805(a), by the legislative history, or otherwise.

The question is one of considerable concern to the two steamship lines involved here, although for reasons discussed later it is not the life and death matter Matson contends. The objective, in resolving a disagreement over the construction of a statute, is to ascertain the Congressional intention as to its meaning. The accepted method employed in learning this intention is, *first,* to look at the language of the statute, construing it in such a way that harmony between sections of an entire Act of which it is a part is achieved; *second,* to examine the legislative history if the language of the statute is conflicting or for some reason does

not provide a reliable guide to the Congressional intent; and, *third,* this step being intertwined with the first two, to apply pragmatic considerations that can be deemed to have influenced Congress. *United States v. American Trucking Assns.,* 310 U.S. 534, 543 (1940); *United States v. National Marine Engineers' Ben. Assn.,* 294 Fed. (2nd) 385, 391, (C.A. 2, 1961). The overall ends sought to be achieved by Congress must be used as the guiding light through each of the steps. The following discussion of the three pertinent sections of the Act is taken up in the order of the three above steps, after a description of the overall objectives of the Merchant Marine Act, 1936.

Overall Objectives of the Merchant Marine Act, 1936.

Section 101 of the Act (46 U.S.C. 1101) sets forth the "National Shipping Policy" and provides a statement of the goal sought to be achieved by the Act:

> SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

This statement of the goal is not unlike that expressed in 1920 in the enacting clause of the Merchant Marine Act, 1920 (46

U.S.C. 861) adopted by reference in the 1928 Act (46 U.S.C. 891); but the means for reaching the goal was entirely new in the 1936 Act. The old ocean mail contracts were discarded for a new system of Federal financial assistance, made available primarily for the construction and operation of ships, which was intended to place the citizen owners and operators of American flag vessels on a parity with their foreign competitors. The concept of *parity* is the key to the formula developed in the 1936 Act, as evidenced by the following portion of the Report of the Committee on Commerce of the Senate, 74th Congress, 2nd Session, on S. 3500, Report No. 1721, page 7. This clear and succinct resumé also makes it clear that the "subsidy" payments were not designed as a dole or gift to the operator, as Matson contends. The payments were not deemed to place the operator in such a position of economic strength, vis-a-vis the domestic ocean carrier, that the balance could not be equalized through the elimination of the subsidy for the period the operator was engaged in domestic trade.

> The financial assistance required to adjust the construction differentials is for the purpose of equalizing the difference between American and foreign cost. It is not paid to the ship operator. It is paid to the shipbuilder and represents the difference in cost between American and foreign ship from which American labor benefits. Since approximately 85 percent of the cost of constructing a ship is labor, therefore labor is the chief beneficiary. It is wholly desirable that American wage scales and standards of living be maintained in shipbuilding for foreign trade. The profits of the shipbuilder in the transactions are adequately restricted by recapture.
>
> The operating differential is paid to the ship operator. The amount of this so-called operating subsidy is primarily limited to a repayment of sums of money which he has already disbursed in payment for the American labor employed upon his American ship and for the American materials

> required in its maintenance and operation. This labor and these materials cost more under the American flag than they would have cost under a foreign flag. The repayment or reimbursement to the operator of the excess cost is not, therefore, in any sense of the word, a subsidy. It is merely an equalization of his American costs as against the costs of foreign-flag operation. There can be no profits to the ship operator in the repayment to him of these out-of-pocket excess expenses which he has already incurred. For this reason, many of the restricting and limiting provisions contained in this bill may seem unnecessary, but are inserted to make sure there can be no recurrence of the alleged abuses made possible by deficiencies in the act of 1928. It is the purpose of this bill to endeavor to place the American owner and operator of an American flag ship on a competitive parity with his foreign-flag competitor. "Parity" carries with it no guarantee of profits, and if there are to be any profits, they must be made in competition with foreign shipping.

The same principle of *parity* was the objective in finding the proper competitive balance between the operator of vessels exclusively in the domestic commerce and the subsidized operators in foreign commerce who made incidental calls at island territories under the permission granted in section 605(a). In Commerce Committee Report No. 1721, cited above, the Committee displayed concern for the exclusively domestic carriers when it spoke of the refusal to permit vessels built with construction subsidy to engage in any joint foreign and coastwise trade (page 15) or the payment of operating subsidy in any such trade (page 18). It must be noted, however, that in each of these passages of the Report the Committee made an exception to permit calls by subsidized vessels at our "island possessions". It was the intention of Congress to achieve the desired parity between the subsidized operator engaged in such mixed trading and the exclusively domestic carrier by means of the clauses in section 605(a) and 506 which eliminate the payment of subsidy, pro-rata, while the subsidized vessels are engaged in domestic trade.

Appendix

The Language of Sections 506, 605, and 805(a) as a Guide to the Intent of Congress

There are patent inconsistencies in these sections of the Act if they are interpreted to cover the same vessels and services. The only support for the interpretation of section 805(a) urged by Matson is the use of the phrase "any vessels" in section 805 to describe the ships whose domestic trading gives rise to the requirement of permission. To read this phrase literally and out of context, in this way, results in conflicts within the section and with other sections.

1. Sections 506 and 605(a) contain very precise requirements for refund and reduction of subsidies, in the event the permitted mixed trading is pursued, based on a carefully worked-out formula which is geared to relative gross profits in the two types of trading, taking into account the statutory 25-year life of the vessels. If 805(a) is deemed to cover the same vessels and services, this formula cannot be reconciled with the general prohibition against diversion of subsidies contained in the last paragraph of 805(a). There is no evidence in the draftsmanship throughout the Act that its framers were capable of such redundancy.

These two provisions with respect to operations in domestic trades are patently designed to cover entirely different circumstances. The earlier sections are clearly related to the operation of subsidized vessels. On the other hand, section 805(a) is just as clearly designed to govern the contractor's use of a separate service, or the use of subsidiaries and the like, in the domestic commerce. Unless this dichotomy of objectives, and of the means employed to meet them, is recognized, section 805(a) is out of harmony with sections 506 and 605(a).

2. A reading of the entire Act demonstrates that its creation involved legislative draftsmanship of the greatest complexity, since it sets forth a wholly new program, covering an entire

industry, and putting into words the resolution of conflicting desires of various segments of the industry, shippers, and the public. Such a reading also shows that the draftsmen who prepared the text were quite adept at using statutory language to reflect every sort of condition, proviso, exception, exclusion and other restricting and limiting devices. It seems certain that if the intention was to have sections 605(a) and 805(a) cover the same circumstances, or overlap in their coverage, we would see in section 805(a) the clause "subject to the provisions for reduction of subsidy contained in section 605(c)"; and 605(c) would surely have said "subject to obtaining the permission required by section 805(a)."

3. The unambiguous language of section 605(a) states that "subsidy may be paid on a - - - voyage in foreign trade on which the vessel may stop at the State of Hawaii." There is a patent conflict between the two sections if they are deemed to cover the same situations, for section 805(a) states that it shall be unlawful to pay any subsidy if the contractor "shall - - - operate any vessel - - - in the domestic intercoastal or coastwise service."[1] For this reason alone section 805(a) cannot be read to cover the use of subsidized vessels in domestic service. One of the canons of statutory construction requires that the various sections of an act be construed so as to give harmony, rather than conflict, to the whole. *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282 (1957).

4. If section 805(a) were intended to cover subsidized vessels and operations it would not have been confined to Title VI, which covers *operating* subsidies; it would also have required permission for the use in domestic trades of vessels that had been *built* with construction subsidy under Title V. It should be noted in this connection that section 506 permits the construction subsidy ves-

1. The "intercoastal or coastwise service" has been held to include calls at Hawaii, *Pacific Far East Lines v. Federal Maritime Board*, 275 Fed. (2nd) 184, (C.A.D.C., 1960).

sels to be operated temporarily in the exclusively domestic trade, provided the consent of the Board is first obtained (and the last sentence prohibits payment of operating subsidy for the temporary period). Section 805 is therefore completely unnecessary insofar as subsidized vessels are concerned. It merely duplicates the permission required by section 506, unless it is recognized that 805 was intended to refer to ships other than the subsidized ships. Sections 506 and 605(a) round out the complete Congressional plan for the treatment of vessels either constructed or operated with subsidy, insofar as the area of operation is concerned. These sections, and no others, deal particularly with trading areas of subsidized vessels, while section 805(a) provides general coverage of non-subsidized vessel ownership, operation, etc. by the contractor, affiliates, etc., that compete with domestic carriers. The latter must be construed to cover vessels and services other than those that are subsidized under the rule that in statutory construction the particular provision governs over the general. *Mac Evoy Co. v. United States,* 322 U.S. 102, 107 (1944); *Karrell v. United States,* 181 Fed. (2nd) 981, 986, (C.A. 9, 1950).

5. The inclusion of the "grandfather clause" in section 805(a) is also revealing as to the vessels and operations intended to be covered. If the section is construed so as to include the voyages of the vessels covered by operating subsidies, the owner of those subsidized vessels that qualified under grandfather rights could enter the trade between New York and Norfolk with subsidized vessels without even having to pass muster under the unfair competition and "public interest and convenience" test contained in the statute, and without a reduction of subsidy except insofar as the "diversion" clause might apply. No one would contend that such an intention could be attributed to Congress. The reference in this clause to "trades for which application is made" necessarily refers to application for permission under section 805(a), for there is no provision for applications for subsidy in domestic operations.

6. When 805(a) requires "written permission" to engage in certain services, it cannot be deemed to refer to those four mixed services expressly permitted by section 605(a), because the manifest plan of the Act is that those voyages will be authorized by contract. "Written permission" is something entirely apart from the "contract" entered into under Title VI. All services and voyages that a subsidized operator is permitted to perform and to make are covered in detail in the Operating Differential Subsidy Contract. This includes the intermediate calls at Hawaii. "Written permission" under section 805(a) covers something else, as it would be idle to duplicate the contract terms with a "written permission".

7. Sections 506 and 605(a) contain flat prohibitions against contracting for or paying subsidy on domestic voyages other than the four mixed voyages enumerated in these sections. If voyages of the subsidized vessels themselves were deemed to be covered by section 805(a), there is nothing in that section to prevent the Board, after hearing and making the stated findings, from granting permission to use the subsidized ships in the service flatly prohibited by the earlier sections and the contractor would not even be subject to the refund of subsidy provision of 506 and 605(a).[2] The inconsistency is apparent. Matson acknowledges in a footnote on page 34 of its reply brief to the Hearing Examiner, "Obviously, only a separate [from the subsidized vessels] exclusively domestic service could be so authorized [under section 805(a)]." This is tantamount to saying that the "any vessel" provision in 805(a) cannot be read literally.

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2. Sec. 714 of the Act contains provisions governing the trading areas of vessels chartered from the Government that are similar to those in sections 506 and 605(a). It cannot be said that section 805(a) was intended to cover the operation of these vessels simply because it covers "any vessels" chartered for use in the domestic service. The phrase could not have been meant to refer to the Government vessels chartered under section 714 for they are chartered for use in the foreign trade, solely by the contractor and not by any affiliates, et cetera. Thus the section 714 restraints and permissions stand alone, like those of section 605(a), not subject to or expanded by a grant of permission under 805(a).

In view of the conflicts between the sections of the Act that would result if they are construed as Matson contends, there is justification, indeed a need to turn to the legislative history of the Act. *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

A detailed study of the legislative record does not require or permit the conclusion that section 805(a) must be construed to cover subsidized vessels and operations, regardless of the conflict such a construction would cause. Instead, the legislative history provides strong reinforcement of the view that Congress intended that intermediate calls of operating subsidy vessels at domestic ports be governed exclusively by sections 605(a) and 506 and that permission under section 805(a) was not intended to be required in these circumstances.

Under the Merchant Marine Act, 1928, ocean mail payments —a form of subsidy that was superseded by that authorized in the 1936 Act—were made on voyages such as those States seeks to make, even including the days spent on the domestic leg. The initial bill leading to the 1936 Act (S. 2582, 74th Congress, 1st Session) authorized subsidies for the operation of ships to be used in the "foreign commerce of the United States" (Sec. 505).[3] Foreign trade was defined (Sec. 1010) as trade between the United States, its territories and possessions, and a foreign country. In keeping with the scope of the 1928 Act as to trading areas, the definition continued (page 17):

> The loading or unloading of cargo, mail, or passengers at any port in any territory or possession of the United States shall be deemed to be foreign trade if the stop at such territory or possession is an intermediate stop on what would otherwise be a voyage in foreign trade - - -.

3. Found on page 7 of Hearings before Senate Commerce Committee on S. 2582, April 25 and 26, 1935.

In this bill, there was no prohibition to protect against the subsidized operator entering the domestic trade through the device of employing separate, non-subsidized vessels or services, or forming an affiliated company for this purpose. Protests from domestic operators who testified before the Congressional committees apparently convinced those in charge of the legislation that such protection was needed. Other witnesses pointed out that it was inconsistent with the principle of preventing subsidy for ships in domestic trade for the definition of "foreign trade" to include the domestic portion of a mixed voyage. However, a domestic operator testified that stops at Hawaii on the trans-Pacific service presented "a different situation" from the New York/Baltimore/Puerto Rico trade that he served.[4] This same view had been expressed in the May 13, 1935 report of the Special Committee to Investigate Air Mail and Ocean Mail Contracts[5] on page 15:

> It is apparent that not only has this company [referring to an ocean mail contractor who had heavy investment in a domestic operator] placed the profits from postal contracts in competition with unsubsidized American-flag enterprises, but that by so doing it has deprived itself of funds which might otherwise have been available for replacing vessels which will be worn out upon the expiration of the postal contracts.
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> Operators in what is known as the "nearby-foreign" trade, which is semi-protected [other passages identify this as the Central American and Caribbean areas], are also extensively aided by postal contracts at the expense of their unsubsidized American competitors.

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4. Senate Committee on Congress, Hearings on S. 2582, 74th Congress, 1st Session (1935), p. 229.

5. Senate Report No. 898, 74th Congress, 1st Session. See also the Report of the Postmaster General to the President found at p. 1103 of Hearings Before House Committee on Merchant Marine and Fisheries, 74th Congress, 1st Session, on H.R. 7521.

This passage and Report No. 1721, discussed on page 9,[5a] supra, show the two separate problems that required the inclusion of the respective sections under study. The first paragraph expresses concern over abuses not involving the use of the subsidized ships. The second paragraph dsecribes certain problems incident to the operation of the subsidized ships themselves. Most significant, however, is the reflection of the view that mixed trading involving intermediate calls at Hawaii on voyages in the distant Far East trade was not the same problem *with regard to unfair competition* as that where the subsidized operator engaged in domestic voyages that included calls in the "nearby-foreign" trade. The solution to these problems appears in the formula incorporated in section 605(a) and 506. That is, no calls are permitted in domestic commerce except those on the four, named, distant trades, with a reduction and refund of subsidies for the domestic portion. The subsidized operator is, at the outset, flatly excluded from any domestic service in connection with calls at such "nearby-foreign" trading.

The separate solution of the separate problem of the use of affiliates or vessels and services separate from those that are subsidized was accomplished by section 805(a).

The first version of what became section 805(a) was an amendment offered by Senator Black to S.2582 (79 Cong. Rec. 6499) which provided:

> Sec. 511.(a) No contractor under a contract in force under this title, or no holding company of such contractor or no officer, director, or executive, or no member of the immediate family of any of such officers, directors, or executives of such contractor or such holding company, shall (1) own any pecuniary interest in any person performing or supplying stevedoring, terminal, ship-repair, ship-chandler, towboat, wharfage, or kindred services in any domestic port or ports.

5a. On p. 19, the Senate Committee describes the activities which came to be covered by 805(a) as "any interest" in "the coastwise business."

(2) Own any pecuniary interest in any person servicing any vessels of the contractor in a foreign port or ports: *Provided,* That, with the express approval of the Authority, such contractor, or a wholly owned subsidiary of such contractor, may render services to vessels in a foreign port or ports if the profits, if any, incident thereto are included in the earnings contemplated in section 505 (c) of this Act. (3) Own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest in any person that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service. (4) Own, charter or operate any foreign-flag vessel or vessels, or own any pecuniary interest in any person that owns, charters, or operates any foreign-flag vessel or vessels. (5) Perform or supply at any domestic port or ports, stevedoring, towboat, ship-repair, ship-chandler, terminal, or wharfage services for any vessel: *Provided,* That such contractor may itself, with the express approval of the Authority, perform stevedoring services to and/or utilize its own terminal and/or wharfage facilities for its own vessels. (6) Own any pecuniary interest in any person employed as agent or broker for any contractor under a contract in force under this Act.

Clause (3) is the prohibition against engaging in domestic intercoastal or coastwise service, "or own[ing] any interest in any person" who does so. It is significant that this is one of a series of six activities, all of which are separate and apart from the actual operation of the subsidized service. It is a list of peripheral activities that are denied to the recipient of subsidy. Clause 3 cannot be read as applying to the operation of the subsidized ships themselves any more than could clause (4), for example, which refers to the operation of foreign flag ships. Thus the operation of vessels referred to cannot logically be taken to mean the subsidized vessels. This is particularly true because of the inclusion in the prohibition of owning "an interest in any [other] person" that operates the ships. Such persons will not be operating the subsidized ship, so the section must refer to other ships.

The dichotomy in the purposes of sections 605(a) and 805(a) is evident even at the inception of the latter, for S.2582 permitted subsidized ships to engage in specified mixed trade and required a reduction and refund of subsidy (section 504 and 507(d))[6] in the version before the Senate at the time Senator Black introduced his amendment. He did not propose a change in these provisions.[7] The prohibitions in his amendment were therefore intended to apply to other vessels—not those that were subsidized.

The legislation went through various hearings, revisions, and refinements in both houses during the course of which the unbroken thread of purpose in section 805(a) as distinct and separate from that in 605(a) and 506 was woven into the legislative record. For example, during the Senate Committee hearings on S.3500, Mr. J. S. Peacock, Director of the Shipping Board Bureau, who participated extensively in the hearings, testified on March 10, 1936, and was asked by Chairman Copeland, (page 87 of Hearings):

> I notice in this paragraph I just read [section 805(a)] that you prohibit any pecuniary interest of the contractor in the coastwise business except on permission of the Authority and after public hearing. What situation is there that you know of in the shipping industry today that prompts the necessity for this provision.

Mr. Peacock explained that it was for the protection of those persons engaged exclusively in the domestic trade. In answer to another question, he stated that the bill does not provide any subsidy for strictly coastwise trade. Senator Bachman then stated, "But the Authority is given permission to grant it." To this Mr. Peacock replied that the permission here [the subject was a version

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6. Found on pages 7 and 9 of the Senate Committee Report on S. 2582, cited in footnote 4.

7. See also letter to the Chairman of the House Merchant Marine Committee dated May 9, 1935, from the Assoc. of Am. Railroads at page 943, Hearings on H. R. 7521, 74th Congress, 1st Session.

of 805(a)] referred to permitting a subsidized foreign trade operator also to operate *separately* and *independently* in intercoastal service. Matson raises questions as to the conclusiveness of this statement in view of the fact that Senator Bachman said, "I did not so construe it." Apparently the Senator was referring to his obviously erroneous understanding that the Authority was "given permission to grant" subsidy in the strictly coastwise trade. In any event, his statement does not reflect dogmatic disagreement. It is more in the nature of the expression of a previous and now abandoned view.

Matson points out the fact that certain progenitors of sections 506 and 605(a) required Commission approval for the mixed trading covered in those sections and in the same version of the legislation the forerunner of section 805(a) also required permission, and concludes that this is evidence that all three sections were intended to cover the same vessels and operations and that the permission sections were removed from the former as being duplication and therefore unnecessary. There being nothing in the legislative record to support this view, it is more logical to conclude that the permission and hearing provisions in the early version of 506 and 605(a) were omitted because they were rejected outright by Congress. The very nature of these two sections is such that they could be automatic in their application to all subsidized operations and self-executing. Congress chose not to proliferate administrative hearings needlessly. On the other hand, the general prohibitions of 805(a), involving as they do an entire spectrum of possible factual circumstances, do logically require referral to the administrative agency for ad hoc solution and application.

On page 77 of the Report of the Senate Committee Hearings on S.3500, 74th Congress, 2nd Session, the Chairman developed this subject further with Mr. Peacock:

The CHAIRMAN. I would like to have you answer specifically this question which I will ask you: Is it probable that there are some services which could be established only through a combination of coastwise and foreign activities?

Mr. PEACOCK. That is absolutely true.

Senator WHITE. What about the Matson people? What about the Dollar Line?

Mr. PEACOCK. I was going to say that is absolutely true, if you have in mind that coastwise includes not merely our coastal ports and our intercoastal service but also includes Puerto Rico, Hawaii, and perhaps one or two other small possessions. It is absolutely true, I think, as to all the trans-Pacific services such as Senator White mentioned. This present committee draft of the print of the bill is intended to take care of it by the prorating method as to those services. Now, it does not take care of it as to strictly intercoastal services which are partly coastal and partly foreign, going through the Canal and stopping perhaps at one or two foreign ports, Mexican, Central American, and South American ports. As to them, I would hesitate to say. I am not in a position to say "Yes" or "No", whether it is essential to the continuation of those services or not. (Underscoring added to indicate the particularly relevant statement)

On page 76 of the transcript of the Senate Committee hearings, Mr. Peacock, who participated in the drafting of the Act, and the Chairman of the Committee engage in a dialogue that clearly expresses their view that the section 605(a) requirement for reduction in subsidy is all the protection that is needed or intended to prevent unfair competition against the domestic operator arising from the operation of the subsidized vessels.

After Mr. Peacock stated, before the Senate Committee (p. 75 of Hearings), that ships in domestic as well as those in foreign commerce are valuable for national defense purposes, Senator Copeland, the Chairman, stated, in regard to the national defense, that with a combination of foreign and domestic trade, bigger

and faster ships might be built than would be proper for either the coastwise or foreign trade alone.

The Chairman and Mr. Peacock also agreed (p. 76 of Hearings) that the question of requiring restraints on trading areas of the subsidized ships *themselves* is no different where operating subsidy (Title VI) is concerned than where construction subsidy (Title V) is concerned. Since 805(a) does not mention Title V, clearly no restraint regarding the area of operation of ships built with construction subsidy was intended. It appears from the above analogy that *this section* was also not intended to impose restraints on the employment of ships *operated* with subsidy.

While the above excerpts provide an adequate demonstration of the fact that Congress did not intend for section 805(a) to apply to the operation of subsidized vessels, they cannot substitute for a study of the full committee reports and the pertinent portions of the transcripts of their hearings. Passages too numerous to include here, many of which are too subtle to permit a brief description, appear throughout the legislative record in support of the conclusion reached here.

Mr. John Nicolson, formerly Special Counsel of the United States Shipping Board, stated on page 151 of his book, THE MARITIME SUBSIDIES, after quoting section 805(a):

> It is not the subsidized vessels to which this provision refers, for of course *they* cannot operate in coastwise or intercoastal trade—save in the excepted cases mentioned in Sec. 605(a). The prohibition of *this* section relates to an interest in vessels other than the subsidized vessels and which other vessels it is proposed shall be operated in coastwise trade.

The intended effect of sections 506 and 605(a) was recognized and affirmed by the more recent Congress which in 1959 voted statehood for Hawaii. This is evidenced by the following portion of Senate Report No. 80 on the Hawaii-Admission to Union Bill:

Hawaii is on many trade routes to and from the Orient. Therefore, it has been a common port of call for American vessels in foreign trade. Such vessels are often granted certain federal subsidies to better enable the American merchant marine to compete with foreign fleets. One of the conditions to grants of subsidies is that such vessels will not engage in domestic trade in competition with the nonsubsidized coastwise and intercoastal carriers. The protected routes granted to nonsubsidized vessels include trade between the continental United States and any American possession or Territory. The Merchant Marine Act of 1936 made an exception to call at Hawaii while on a voyage in foreign trade, making an adjustment in subsidies to prevent improper competition. This type of shipping is an integral part of the important Hawaiian shipping industry. To change it would cause serious and unnecessary confusion. 1959 U. S. Cong. and Admin. News, 86th Cong., 1st Session, p. 1348. (Underscoring added to indicate the most relevant portion.)

Pragmatic Considerations Reflecting the Intent of Congress

The national shipping policy, expressed in section 101 of the Act, 46 U.S.C. 1101, set out on page 8, supra, has as its twin goals the enhancement of the national defense and the promotion of the foreign and domestic commerce of the United States. Ships employed in domestic and foreign trade were deemed to be equally useful in national defense,[8] therefore the statutory treatment of mixed foreign and domestic trading must be considered in relation to the effect of such activities on commerce. Having authorized, in sections 605(a) and 506, the mixed trading of the type sought by States, provided the subsidy is reduced pro-rata, can the intention logically be attributed to Congress to re-

8. See testimony of Mr. Peacock, p. 75 Hearings on S. 3500 Before Senate Committee on Commerce, 74th Congress, 2nd Session.

quire, in addition, *as a means of promoting commerce,* that section 805(a) consent for such trading be given by the Board after public hearings?

In the absence of a clear and unambiguous expression of such an intention in the Act, practical considerations weigh heavily against the view that Congress so intended. In ascertaining the Congressional intent as to mixed foreign and domestic trading it is necessary to go back to 1936 and the birth of the operating and construction subsidy program, without regard to the parochial interests of States and Matson in 1965. It was just as true in 1936 as it is today that the American merchant marine serves our commerce best when it provides frequent, regular service at reasonable rates. This service would be impaired if subsidized vessels in the trans-Pacific trades, passing within a few hours steaming of Hawaii and the island territories, were prohibited from serving the foreign commerce engendered there, as well as the off-shore domestic commerce. Obviously the calls for foreign trading would be diminished if the vessels were not permitted to load and discharge domestic cargo on these calls. Additional calls at Hawaii to serve the trade from that State to the Far East and return will promote our foreign trade. Similarly, direct sailings from San Diego to Hawaii and to the Far East and return will promote commerce in these areas.

Congress must have realized that revenues of subsidized operators would be reduced if subsidized vessels destined for the Far East and return were required to sail right by island ports where cargoes were available, without stopping. This would reduce the Government's recapture of subsidy payments under section 606 of the Act and the amount required to be laid aside for vessel replacement under section 607. An intention to bring about such a waste of public funds cannot be inferred. Restraints on free competition are imposed in only the most exceptional cases by Congress. Our national policy favors such competition. Therefore Congress did

not elect to place limits on the calls at Hawaii by subsidized vessels engaged in the Far East trades. Instead, Congress provided competitive protection for the domestic carrier by the elimination of the subsidy aid for the domestic portion of the contractor's mixed voyages.

In construing the provisions of the Shipping Act, 1916, which provides certain exemptions from antitrust laws when the Federal Maritime Commission approves cooperative working arrangements among steamship lines, the United States Court of Appeals, D. C., held that the Commission should keep before it, in considering the approval of particular arrangements, the prohibitions of the antitrust laws and see to it that conduct that, without Commission approval, would violate the antitrust laws does invade the prohibition of these laws any more than is necessary to serve the purposes of the shipping statutes. *Isbrandtsen Co. v. United States*, 211 Fed.(2nd) 51, 57 (1954). This interpretation of the Shipping Act is entirely applicable to a comparative construction of sections 605(a) and 805(a). Congress would have had in mind that limiting the calls at Hawaii would tend to give a monopoly to the exclusively domestic operator. Indeed, the erroneous interpretation of the Act in the past, requiring such permission, has had this result.

The same considerations do not apply to the operation of a separate, domestic service by the contractor or by a company related to the contractor. Congress could not anticipate the variety of situations that might occur in these activities and relationships and attempt to provide for each by specific statutory provisions. Also, such operations would have no bearing on the amount of subsidy paid, due to the absolute prohibition in section 805(a) against the diversion of subsidy funds. Congress left it to the Board to prevent such trading if, after the Board learned the facts in each instance, it found that unfair competition or prejudice to the objects and policies of the Act would result.

In attempting to apply section 805(a) to operations of subsidized vessels, Matson has created an enigma or riddle concerning the proper method of accounting to determine whether subsidy funds would indirectly be used to compete with the domestic operator. They urge that the accounting must be done by pretending that the ships in question are really not the subsidized ships at all, but ships operated on a separate service. This leads, according to their argument, to an allocation of all operating costs to the domestic leg, not merely the "incremental" or out-of-pocket costs. It requires that we close our eyes to the fact that the ships are in the vicinity of Hawaii on every foreign voyage. This strained construction of the statute is self-defeating. The contention that the operating costs must be allocated artificially, as though States were employing special vessels, separate from those in subsidized foreign trade, for the Hawaiian calls, demonstrates the weakness of the argument that section 805(a) applies when the same vessels are used in both segments of the mixed voyages. The section 605(a) requirement for reduced subsidy was adopted as an effective means of preventing the use of subsidy money in the domestic portion of the voyages of the subsidized vessels. Congress thus avoided the very enigma Matson would now create.

Congress was also aware, of course, that domestic operations are confined to United States flag vessels owned by United States citizens. Section 27, Merchant Marine Act, 1920, (46 U.S.C. 883). These American vessels are given a complete monoply as against foreign competition and they receive Federal aid such as Government insurance of ship mortgages under Title XI of the Act. Having provided these protections and benefits and the additional protections against competition through use of subsidy payment, covered by sections 605(a) and 506, it cannot be inferred or presumed that Congress intended that section 805(a) was also intended as a protection from the same subsidized opera-

tions. Even without the strong legislative record showing the absence of such an intent, it would have to be concluded that 805(a) was intended to cover *separate* operations, when considered in the light of the above factors.

Previous Board Decisions and the Contract Provisions

Predecessors of the Board required that permission be obtained under section 805(a) in circumstances such as those involved in this case. Matson argues that these decisions are somehow binding authority and that such permission is therefore required here. Conceding that the Agency rejection of the contrary position has been done "*sub silentio*", Matson cites *American President Lines—Unsubsidized Operation, Route 17*, 3 F.M.B. 457 (1951); *American President Lines—Subsidy, Route 17*, 4 F.M.B. 488 (1954); and *American President Lines—Section 805(a) Application*, 4 F.M.B. 436 (1954) as supporting the conclusion that Section 805(a) applies to the operation of subsidized ships in the mixed foreign and domestic services authorized in section 605(a). Such decisions are not binding on the Secretary, of course, and the absence of any statement of reasons in support of the conclusion prevents their being of persuasive force. The issue has never been before the courts.

States points out that in the very first instance where an operator, upon being granted a subsidy contract, was given permission to call at Hawaii with the subsidized vessels, the Maritime Commission did not mention section 805(a).[9] Domestic operators objected to the grant of permission there, but the Agency said that the section 605(a) requirement for reduction in subsidy "would seem to meet the objection." Matson shows that some rather obscure minute of a Maritime Commission meeting held later, in a connected matter, refers to section 805(a). Be that as it may, the published report of the case does not recite any need

9. *Oceanic SS Co.—Subsidy Route 27*, 3 U.S.M.C. 309 (1946).

for approval under 805(a). The San Diego briefs distinguish the above cited cases on the basis that in each of them the domestic operators did not have a monopoly in the trade involved. In the Hawaiian domestic trade, Matson carries close to 95% of all the cargo moving in the trade.

States recognizes, as it must, that a few years after the *Oceanic* case was decided the Commission began requiring section 805(a) approval in all circumstances covered by section 605(a). The question came up in connection with a case before the Agency in 1955 and it was made the subject of a rule-making proceeding. Comments were received by the Agency, which announced in 1957, without stating any reasons:

> The Board and Administrator will continue to review domestic operations of the nature described in section 605(a) so as to be able to determine, pursuant to section 805(a), whether permission should be granted for such domestic operations - - -.

The tone of this pronouncement carries the connotation that the decision resulted from the exercise of administrative discretion, rather than a legal requirement. The Board, acting for the Secretary, does have a discretion under Title VI as to the permitted trading areas, but section 805(a) with its special standards and its requirement of a hearing do not control the exercise of this discretion.

When the issue came before the Hearing Examiner in the instant case, he ruled that while he felt there was merit in States' position, section 805(a) permission was required because the Board had so stated in the order that initiated the proceeding. The order was undoubtedly issued as a routine matter in following past Agency practice. When the matter came before the Board upon exceptions to the Examiner's recommended decision the Board stated, "The Examiner found, and we agree, that the Act requires States to obtain written permission under section 805(a)

. . . ." This characterization of the Examiner's action was obviously inaccurate.

The Board discussed the problem briefly, concluding, without citing any particular passages, that the legislative history of the Act upheld their view. The only reason given that provides a clue to the Board's thinking is the statement:

> If a hearing were not provided to test intervenor's complaint of unfair competition or prejudice to the objects and policies of the Act there would be no way to judge whether any operator who intended to serve the domestic trade would compete unfairly with operators engaged exclusively in the trade.

Aside from begging the question by assuming that the tests of unfair competition and prejudice, in these circumstances, are material, this statement reveals that the Board did not consider or address itself to the real question. The quoted statement lumps together all operators "who intend to serve the domestic trade", thus betraying a failure to understand that States' thesis is based on a difference in the treatment intended for operators employing subsidized vessels, on the one hand, and separate vessels, on the other.

States does not contend that a hearing and findings is not required under 805(a) for the latter class. Over the years, the great preponderance of reported Agency cases under section 805(a) involved operators desiring to engage in the trades described in section 605(a) by employing such separate services. These cases are clearly distinguishable. The applicant listed citations to published decisions in 43 such cases in one of its briefs, while they found only eight cases involving the use of subsidized vessels in the mixed trades listed in section 605(a).[10]

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10. In his recommended decision, Examiner C. W. Robinson stated that this was the first proceeding in which a full analysis had been made of the situation where the contractor desired to engage in mixed trading with the subsidized vessels.

The erroneous interpretation placed on these statutes in years past led the Agency to place a provision in States' operating subsidy contract (Para. 1-2(f)(4)) prohibiting service between Hawaii and the mainland beyond the 13 calls "except pursuant to written permission granted under Sec. 805(a) of the Act; - - - ." Matson contends that the applicant and the Government are bound somehow to this erroneous interpretation because it is embodied in the contract. States urges that a Government agency may not by contract change a statutory plan embodied in the Act, and that if it is attempted the private contractor is not deemed to have surrendered his rights under the Act by signing the contract. *American President Lines v. United States,* 291 Fed.(2nd) 931 (1961); *Moore-McCormack Lines v. United States,* 288 Fed.(2nd) 898 (1961); *A. H. Bull SS Co. v. United States,* 108 Fed. Supp. 95 (1952).

Matson also argues, as I understand the point, that the practice of inserting such clauses in the operating subsidy contracts led Matson to permit the action to be taken without protest, when his contract was arranged, and without intervening to protect Matson's interest. It does not appear that Matson was injured by the error. In fact, it has been the beneficiary of it because it has had the protection of this restrictive clause in the contract. Such an argument could not be permitted to perpetuate the error, in any event. Part II of the two-part contract of every subsidized operator is the same, containing the "boiler plate" clauses. Clause II-15 covers the matter of engagement in coastwise and intercoastal service. It is a direct quotation of section 805(a), for the most part. This establishes that the provisions of Clause II-15 and the above quoted provision of Para. 1-2(f)(4) of the contract were not placed there as the result of the exercise of administrative discretion but rather because of a mistaken interpretation of the statute.

The Hearing Examiner determined, with complete justification of course, that he was bound by the precedent established by the maritime agencies. This precedent undoubtedly influenced the Board's decision as well. However, the Secretary is not bound by such decisions. It is unnecessary to discuss the effect of the contract terms further, because it is within the authority of the Secretary, upon the request of States, to revise the contract and this shall be done. After 57 days of hearing, during which the issue was raised, and four rounds of briefs in which this entire issue was covered at great length by both sides, Matson's claim that the question may not be considered because it was not stated in the notice of the investigation is without merit.

II. *Other Issues*

It is appropriate to consider States' contention, at this point, that even if section 805(a) were applicable to the circumstances here, the subsidy payments to States could not be considered as an element of unfair competition since Congress eliminated this element by sections 605(a) and 506 in requiring the reduction in subsidy for the period States will operate in the domestic trade. It must be concluded that since Congress did not intend section 805(a) to apply in a case like this, it could not have intended that the payment of subsidies in the foreign commerce portion of the mixed service could be deemed to be unfair competition to the exclusively domestic operator. But even assuming that the section 805(a) tests were issues to be considered here, it could not be found on this record that Matson would suffer unfair competition by reason of these additional calls by States.[11]

11. States also contends that Matson is not "operating exclusively in the coastwise or intercoastal service" and is therefore not entitled to the protection of section 805(a). Matson has a wholly owned subsidiary, Oceanic Steamship Co., that operates in the foreign commerce with Government subsidy. The two firms have the same officers, directors, and offices, file joint income tax returns, publish joint financial statements, and Matson

Matson employs 23 vessels in its freight service, providing about 13 round voyages per month between San Francisco and Hawaii and 5 separate round trips between Los Angeles and Hawaii. A tight service is run, with the result that frequently only about 5% unused space per vessel is experienced. This is an unusually high vessel utilization. Shippers sometimes have to wait 10 days or two weeks for their goods to be lifted. This is probably not an inordinate delay, but there is evidence that the tight schedule causes some shippers to "stand in line" before tendering their cargoes for transportation. The delay has not been shown to be excessive, but the trade by no means can be considered overtonnaged.

Matson's vessels are, on the average, smaller, older and slower that States'. However, they are well suited to transport the cargoes offered. Almost all are equipped to transport practically every commodity moving in the trade in containers, or vans, that are capable of being moved by truck from and to the marine terminals and loaded aboard ship without removing the cargo. One vessel is specially fitted to carry automobiles, many of which move in this trade.

Matson carries nearly 95% of the liner cargo in the trade and an even greater portion of the bulk cargo. Competition enters the trade from time to time, but with little or no success against Matson's efficiency and its entrenched position. The record does not show precisely what other carriers, either bulk and liner, are

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manages all of Oceanic's operations under a management contract between the parent and subsidiary. The Board rejected this contention for the reason that the domestic calls are made as a separate service, not with the use of the subsidized vessels. Without looking beyond the language of the statute, States' argument appears to have considerable merit, but in view of the other conclusions reached here, it is unnecessary to decide this question.

The Board's distinction between the two methods of operation is interesting. Without acknowledging the validity of the distinction as it relates to the "exclusively engaged" issue, it is readily seen that such a distinction applies, *a fortiori*, to the question of the applicability of 805(a), because of the impact of sections 605(a) and 506 on the latter question.

presently in the trade. There are apparently three or four small operators in the trade, but their carryings are so little that this has no bearing on the question of unfair competition. Whoever they are, just now, they have not complained about States' application. On July 15, 1964, Matson consented to a decree to be entered against it in an antitrust suit brought against it by the United States. The effect of the decree was to require certain Hawaiian traders who jointly owned the controlling stock in Matson to sell their shares in order to prohibit the anti-competitive practices in shipping which resulted from their control of Matson.

Matson's financial position appears to be sound and its rates adequate to produce a fair return. It placed in effect a general increase in rates averaging 9.8% in March, 1962. However, in August, 1964 it voluntarily rolled-back the rates to the original level, as this level was considered to provide adequate return on investment.[12] With this roll-back, States' rates are substantially the same as Matson's. The Federal Maritime Commission has jurisdiction to control maximum and minimum freight rates in this trade under the Intercoastal Shipping Act, 1933. This regulatory control renders groundless the fear that a subsidized carrier would enter the trade and precipitate a rate war or offer destructive rate competition. It is the intention of States to continuously follow Matson's rates.

In recent years Matson has carried nearly 1½ million tons of cargo in each direction annually as compared to about 23,000 tons carried westbound, and substantially less eastbound, by States. With the additional calls, it is estimated that States will carry a total of 67,000 tons annually.

In its argument regarding the claim of unfair competition, Matson states that applicant's proposed service will be provided

12. The increase was under investigation in F.M.C. Docket No. 960, *Hawaiian Rates—Second General Increase—1961*. The proceeding was discontinued on Matson's motion when the rates were rolled back.

with Mariner vessels built with the aid of construction subsidy, that these ships are larger and faster than Matson's, and that it would cost Matson $400,000 more per year to build such a ship, on an amortized basis over a 25 year period, than it costs States because Matson cannot obtain such subsidy. This is only one of the arguments based on States' having received construction subsidy. Even assuming the applicability of section 805(a), the effect of such construction subsidy is wholly immaterial because that section relates only to the payment of operating subsidy under Title VI and charters under Title VII. Considered in its best light, such an argument can only be taken to be so influenced by Matson's zeal to preserve its competitive advantage that it colors this intervenor's entire approach to the meaning of the Act.

Matson's contention that if it is shown that States somehow will divert subsidy funds to the domestic trade the application must be denied is equally without foundation. This is not one of the standards of approvability contained in section 805(a) or elsewhere. The anti-diversion clause contained in the last paragraph of section 805(a) does not require another finding prerequisite to approval of domestic trading. On the contrary, it is a condition that attaches only after permission is obtained, the breach of which is made a criminal offense. The protracted proof and arguments regarding such claimed diversion is therefore immaterial at this juncture.

The contention is made that if States were allowed to increase its Hawaiian calls by one per month, merely as an adjunct of its principal service to the Far East, this might make such inroads on Matson that its ability to serve this trade would be jeopardized. This amounts to speculation, at best, and the threat is incredible in view of the fact that Matson, a carrier of great ingenuity with long established connections in Hawaii, makes up to 18 round voyages in this trade per month. Such a contention cannot be accepted as proof that the one additional call by States would be

prejudicial to the objects and policies of the Act. Matson's estimates as to its reduction in net revenues are similarly unacceptable because they are based upon assumptions that are unrealistic. They assume a drop in patronage not supported by the record, and the continuation of operating costs that do not reflect any realignment of services in the event the cargoes did decrease.

The record would not support a finding that the plan of operations described by States, with the 13 additional calls at Hawaii, will result in impairment of States' ability to serve the foreign trade, as contended by Matson. The evidence also does not support the fear expressed by Hawaii that States will take a large proportion of the high-rated cargo, forcing Matson to raise its rates on lower rated commodities.

The Court of Appeals, D. C., recognized a significant difference between competition and unfair competition in *Pacific Far East Lines v. Federal Maritime Board*, 275 Fed. (2nd) 184. In circumstances at least as onerous to Matson as those involved here, the Court decided that PFEL's increased sailings would not give it an ***unfair competitive advantage***. The Court also stated that the preservation of Matson's monopoly in the Hawaiian trade "is not an object and policy of the act." The *PFEL* decision did not involve the question of the applicability of section 805(a) to the operation of subsidized vessels on routes permitted by section 605(a), because *PFEL* sought permission to operate a separate service on the route. Section 605(a) has nothing to do with that; section 805(a) has nothing to do with anything else.

In the Reply Brief filed by San Diego with the Hearing Examiner, a further distinction is pointed out:

> In discussing the effects of the P.F.E.L. case, Matson states on page 16 of their brief:
>
> 'The factual situation here is quite different from that dealt with by the P.F.E.L. case court. For P.F.E.L. received neither construction subsidy nor operating subsidy on the vessels with which it proposed to compete with Matson. Its subsidy was confined to other vessels, operated exclusively in a different trade.'

We agree that the situation is different. In the P.F.E.L. case Section 805(a) permission was clearly needed. Since the vessels to be used in the Hawaiian service were non-subsidized, there was no formula for refunding of subsidy, either construction or operating, and provisions were required to prevent the diversion of subsidy funds to the domestic operation. In this proceeding the vessels to be employed are subsidized vessels and a definite formula has been established by Congress for subsidy refund under Section 506 and 605(a) of the Act. Therefore, the use of non-subsidized vessels require Section 805(a) permission to prevent misuse of subsidy funds, while the use of subsidized vessels are subject to Section 506 and 605(a) which regulates the refunding of subsidy under the formula prescribed by Congress. Therefore, there is no unfair competition.

There are additional reasons here that were not present in the *PFEL* case for finding that the additional calls will not be prejudicial to the objects and policies of the Act. To deny this application would limit the frequency of service available to shippers in both the foreign and the domestic portions of this route. In addition it would prevent the increase of service in and out of San Diego that is needed by civilian shippers and the military establishment. It would be wasteful of shipping services, would be detrimental to commerce, and would be wasteful of subsidy funds, in the circumstances disclosed by this record, to require the States Steamship vessels to sail within a day's steaming time of Hawaii without calling there as requested.

A careful analysis of Matson's arguments based on the economics of the trade lead to the conclusion that, fundamentally, Matson's dissatisfaction stems from the proposition that the subsidy reduction formula found in sections 605(a) and 506 do not provide adequate protection for Matson, as things have turned out. The Secretary is powerless to amend this formula, of course. His duty is simply to administer the law as he finds it. The remedy

for this problem, if it is a problem, is an amendment to the statutes.

Matson expresses the fear that unless restraints are placed on calls at Hawaii by subsidized operators, under section 805(a), the trade will be overtonnaged and Matson's ability to continue in the trade will be threatened, since these operators will call at Hawaii at will. This overlooks the fact that under Title VI the Agency has the authority and the responsibility to control the number and frequency of sailings of subsidized operators and under section 211 of the Act to establish the services and routes that qualify for subsidized operations as being essential to our commerce. Thus, for example, in establishing Trade Route 29, which is involved here, the Agency determined:

> The Hawaii/Far East trade should be served in conjunction with a limited number of U. S. flag sailings on this and other essential routes and services.[13]

The Board can and it will exercise this authority so as to guard against overtonnaging this mixed foreign and domestic service by subsidized operations and so as to prevent intermittent calls or calls "at will". Hawaii should and it will be treated entirely separately from the two ranges of ports on the Pacific Coast in determining the permitted trading areas under the Act. The means are at hand in the Act, apart from section 805(a), to assure the regularity of service that is essential to shippers and the expansion of commerce without undue impact on established operators. These discretionary powers will be exercised as part of the Secretary's contracting authority under the Act and the delegation of authority to the Board.

For the foregoing reasons it cannot be concluded that the increased calls would result in unfair competition or be prejudicial to the objects and policies of the Act.

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13. *Essential United States Foreign Trade Routes*, published by U. S. Department of Commerce, Maritime Administration, July 1960, page 62.

There was no prejudicial irregularity in the Board's opinion being published after its Chairman resigned, as contended by Matson. The decision itself was arrived at while he was still in office.

Matson requests that in the event States is permitted to increase its calls at Hawaii, the effective date of this decision be postponed 60 days and, in the event judicial review is sought, thereafter until the final disposition of such litigation. The effective date of this decision will be postponed 60 days in order to afford Matson time to seek judicial relief, but the decision shall become effective at the end of that period unless a stay should be ordered by a court.

Matson's argument as to restrictions that should be imposed, if permission under section 805(a) is granted States to make the additional calls, must fail in the light of this decision regarding the scope and meaning of section 805(a). In addition, the argument is a repetition of points raised elsewhere by Matson and covered elsewhere in this decision.

Contentions and proposed findings and conclusions not specifically discussed herein have been considered and those not adopted have been found not to be supported by reliable and probative evidence or to be irrelevant.

Ultimate Conclusion

Under sections 605(a) and 506 of the Merchant Marine Act, 1936, subsidized vessels may engage in voyages in the foreign trade with intermediate stops at the State of Hawaii, pursuant to contracts with the United States which limit the number of such voyages and the calls in various segments thereof under the authority of other provisions of Title VI and section 211 of the Act. No additional Government permission for such voyages of the subsidized vessels or services is required under Section 805(a) of the Act, as that section applies solely to the operation in domes-

tic commerce of vessels other than those whose operation is subsidized.

This proceeding is hereby remanded to the Maritime Subsidy Board which shall enter an order forthwith in accordance with this decision and shall discontinue the proceeding. The Board shall also revise the States Steamship Company subsidy contracts in accordance herewith, eliminating any limits on the trading areas that are based on section 805(a) of the Act. However, the effective date of the said order and the revision of the contracts shall be postponed for 60 days.

E. ROBERT SEAVER
E. Robert Seaver
Review Examiner

Washington, D. C.
March 1, 1965

Appendix B

Department of Commerce
Maritime Administration
Maritime Subsidy Board

Docket No. S-121

STATES STEAMSHIP COMPANY—APPLICATION TO CALL AT HAWAII

Submitted: September 27, 1963 Decided: October 7, 1963

Served November 27, 1963—Maritime Administration
Maritime Subsidy Board

In the matter of the application of States Steamship Company, a subsidized carrier, for permission under Section 805(a) of the Merchant Marine Act of 1936, as amended, to have vessels in its "B" and "C" services call at Hawaii on not to exceed 26 outbound and 26 inbound sailings annually, for the transportation of cargo between California and Hawaii.

James L. Adams and *Gordon L. Poole,* for applicant.

George D. Rives, John E. Sparks, and *Alvin J. Rockwell* for Matson Navigation Company; *Shiro Kashiwa, Bert T. Kobayashi,* and *Richard Sasaki* for State of Hawaii; *William R. Daly* for San Diego Unified Port District; and *Odell Kominers* for Pacific Far East Line, Inc., intervenors.

Louis Zimmet, David Schmeltzer, and *John Day* as Public Counsel.

FINAL OPINION AND ORDER OF THE BOARD
Donald W. Alexander, Chairman, and J. W. Gulick and
Robert J. Ables, Members

Found That:

1. States Steamship Company's proposed service to have vessels operating in its "B" and "C" services[1] on Trade

1. "B" service: Washington-Oregon-California/Far East; "C" service: California/Far East.

Route 29 (U.S. Pacific/Far East) call at Hawaii on not to exceed 26 outbound and 26 inbound sailings annually for the transportation of cargo between California and Hawaii will not result in unfair competition to any domestic operator within the meaning of Section 805(a) of the Merchant Marine Act, 1936, as amended.

2. States Steamship Company's proposed service to have vessels operating in its "B" and "C" services on Trade Route 29 (U.S. Pacific/Far East) call at Hawaii on not to exceed 26 outbound and 26 inbound sailings annually for the transportation of cargo between California and Hawaii would not be prejudicial to the objects and policy of said Act.
3. A subsidized operator is not excused by Sections 506 and 605(a) of the Merchant Marine Act, 1936, as amended, from obtaining the written permission of the Board under Section 805(a) of the Act to operate vessels in a domestic service for which Sections 506 and 605(a) require the pro rata pay back of construction subsidy and the pro rata abatement of operating subsidy.
4. Matson Navigation Company is operating exclusively in the coastwise or intercoastal service within the meaning of Section 805(a) of the Merchant Marine Act, 1936, as amended.

Docket S-121
DECISION AND ORDER

States Steamship Company (States) operates a subsidized service on Trade Route No. 29 (U.S. Pacific ports/Far East). In connection with its vessels in its "C" service, States has written permission under Section 805(a) of the Merchant Marine Act, 1936, as amended (Act) to make 13 annual calls to Hawaii, outbound and inbound for transportation of cargo between Cali-

fornia and Hawaii. This proceeding arises from States' letter-application of January 30, 1961 for permission under Section 805(a) to utilize subsidized Trade Route 29 "B" and "C" service vessels (not in excess of 26 annual outbound and inbound sailings) in the California/Hawaii domestic trade.

A hearing was held, briefs and reply briefs were duly filed and on March 11, 1963, Examiner C. W. Robinson issued his Recommended Decision. He found and concluded that granting States' application to increase, to a limit of 26, the number of annual California/Hawaii sailings would result in unfair competition to Matson Navigation Company (Matson), an intervenor in the proceedings, and would be prejudicial to the objects and policy of the Act, except as follows:

> (1) States Steamship Company should be permitted to serve San Diego, California 26 times a year in each direction; and
>
> (2) States Steamship Company should be permitted to lift cargo in California for discharge in Hawaii, but not cargo in Hawaii for discharge in California, to the extent of 26 calls a year, whenever Matson Navigation Company, upon two weeks' prior request therefor informs the shipper, within 24 hours after such request, that it is unable, for whatever reason, to transport cargo offered to it for specific sailings.

Exceptions to the Examiner's findings and conclusions and replies thereto were duly filed. The Board heard oral argument on September 27, 1963.

At the oral argument, States, for the first time in these proceedings, moved to expunge certain arguments said by States to appear unexpectedly in Matson's *Reply Brief to Exceptions* to the Examiner's decision. (pp. 64-73). States claims it had relied on Matson's assurances in its *Brief On Exceptions* to the Examiner's decision, that Matson rested on arguments previously made and

that the additional argument surprised States and Matson, thereby, violated the rules of the Board and fair play by denying States an opportunity to reply to this additional argument.

It is difficult to believe that States has made a serious motion to the Board. The worst adjective it ascribes to Matson's alleged offensive material is that it is an "additional" argument. The Board objects too, to the seemingly endless additional arguments frequently made in proceedings before it but, standing alone, States' argument scarcely supports a motion to expunge. Further, States claims that Matson has violated the Board's rules of practice but fails to cite any provision which has been violated. We refuse to review all our rules of practice and speculate as to which one States believes has been violated.

In any event, Rule 5(o) of the Agency's Rules of Practice and Procedure, effective July 31, 1953, provides that *all motions* and requests for rulings by the Board *shall be in writing* and conform to the requirements of Rule 8. Rule 8 provides that written motions shall show that service has been made upon all parties to the proceeding. On these technical rules of practice alone, the motion is defective. Motion denied.

The Board has considered the Examiner's Recommended Decision, the briefs and exceptions and the entire record in this proceeding and finding merit in various exceptions, hereby rejects the Examiner's recommendations and adopts his findings and conclusions, with noted additions and modifications, only to the extent that they are consistent with the Board's decision.

DISCUSSION:

Four principal issues are involved in this proceeding:

1. The applicability of Section 805(a);
2. Whether Matson is exclusively a domestic operator;
3. The question of unfair competition;
4. Whether it would be prejudicial to the objects and policy of the Act to grant States' application.

1. *Applicability of Section 805(a)*[2]

The Examiner found, and we agree, that the Act requires States to obtain written permission under Section 805(a) for its vessels to call at Hawaii.

The issue concerning the applicability of Section 805(a) is whether written permission from the Subsidy Board is required before States may increase its sailings, as proposed, between California and Hawaii, in view of the fact that subsidy must be repaid by the applicant, or is abated, in accordance with the provisions of Section 506 and 605(a)[3] whenever it engages in the domestic segment of a mixed foreign and domestic voyage.

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2. Sec. 805(a). It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act . . .

3. Sec. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, . . . or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, . . . and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year.

Sec. 605(a). No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: Provided, however, that such subsidy may be paid on a . . . voyage in foreign trade on which the vessel may stop at the State of Hawaii, . . . and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage.

States maintains that such written permission is not required by the Act. The applicant argues that Section 605(a) permits payment of subsidy on a voyage in mixed foreign and domestic trade with stops at Hawaii, provided the subsidy is pro rated. States argues that Section 805(a) is applicable only to unsubsidized vessels of an operator receiving operating-differential subsidy when they engage in domestic intercoastal or coastwise service. In its view, Sections 506 and 605(a) impose the exclusive statutory requirements applicable to States' proposed service and, therefore, it does not require Section 805(a) written permission to make the proposed intermediate stops at Hawaii. The applicant introduced a comprehensive review of the legislative history of Section 805(a) in support of its position.

The Matson Navigation Company, to the contrary, maintains that States Steamship Company is required to get Section 805(a) written permission to make calls at Hawaii because the controlling factor is the service performed and not the vessel used. Matson contends that Sections 506 and 605(a) do not relieve States from the necessity of obtaining written permission under Section 805(a), because those sections deal with the separate and distinct requirements of returning to the Government that portion of operating-differential subsidy which is provided when operating in competition with foreign-flag vessels and do not in any way condition the applicability of Section 805(a), which provides protection for carriers engaged exclusively in the domestic trade. Most importantly, Matson argues that since its adoption by Congress and, without exception, Section 805(a) has been construed to require written permission of the Subsidy Board and its predecessors and that is the Board's contemporaneous construction.

Public Counsel also argues that written permission is required under Section 805(a). They point out that the rules of statutory construction require that meaning be given to each provision of

legislation and that Sections 506 and 605(a) protect the Government, while Section 805(a) is designed to protect domestic operators against unfair competition which might result from a subsidized operator. Finally, Public Counsel maintain that a specific rule-making action (in Docket No. S-59, 1957) disposed of the issue by an order determining that written permission was required under Section 805(a), where operations were proposed under the authority of Section 605(a).

After careful consideration of the arguments presented by the parties, including the comprehensive discussion of the legislative history of Section 805(a) which was introduced by the applicant, we believe that the applicant, in this proceeding, must have written permission from the Board to provide the proposed service.

Although the question is not without doubt, (for the reasons indicated in the applicant's review of the legislative history of this Section) we believe Congress intended controls for the protection of domestic operators in addition to the subsidy repayment and abatement provisions of Sections 506 and 605(a). These controls are intended to be exercised under the authority of Section 805(a), which authorizes the Board, after hearing, to find whether the proposed service will result in unfair competition to carriers operating exclusively in the coastwise or intercoastal service and to determine if the proposed service would be prejudicial to the objects and policy of the Act. If a hearing were not provided to test intervenor's complaint of unfair competition or prejudice to the objects and policy of the Act there would be no way to judge whether any operator who intended to serve the domestic trade would compete unfairly with operators engaged exclusively in such trade. We consider that the questions of unfair competition or prejudice are separate and apart from the questions of repayment or abatement of subsidy when an operator proposes to compete in the domestic trade. Section 805(a) is concerned with unfair competition and prejudice. Sec-

tions 506 and 605(a) are concerned with the repayment or abatement of subsidy for that part of a voyage which does not compete with foreign-flag vessels, but competes with unsubsidized domestic operators. We believe that the rules of statutory construction, require that full meaning be given to each provision of legislation and that the subject for which Section 805(a) was designed is sufficiently different from the subject under Sections 506 and 605(a) as to require separate determination.

We believe that Section 805(a) is a necessary adjunct to Sections 506 and 605(a) in preserving fair competition. It is part of the overall administrative machinery geared to preventing unfair competition in the domestic trade and is applicable to mixed Section 506 and 605(a) voyages. Therefore, we agree with the Examiner that written permission under Section 805(a) is required in this case before States may legally commence the proposed service to Hawaii.

2. *Whether Matson is Exclusively a Domestic Operator*

Section 805(a) states that the Board shall not grant an application if it finds that the proposed service will result in unfair competition to any person, firm or corporation "operating exclusively" in the coastwise or intercoastal service or if it would be prejudicial to the objects and policy of the Act. To be entitled to the protection afforded by this section, therefore, it must be found that the carrier seeking such protection is operating exclusively in the coastwise or intercoastal service.

States Steamship Company contends that Matson is not such an exclusive domestic operator because it operates three services from the Pacific, Gulf and Atlantic coasts with vessels which are frequently interchanged or integrated in other routes. States maintains, further, that Oceanic Steamship Company, a wholly owned subsidiary of Matson operates voyages of mixed domestic and foreign trade in the Far East and that the President of Matson is also the President of Oceanic; that Matson manages Oceanic including joint publication of tariffs, division of fares and com-

mon use of freight solicitors. In addition, States shows that Matson and Oceanic filed consolidated financial statements and tax returns and that Oceanic is identified with Matson's advertising. Further, according to States, Oceanic engaged in domestic California-Hawaii trade in the course of its subsidized Trade Route 27 operations up through April of 1962, indicating that Matson, through its subsidiary organization, Oceanic, was engaged in subsidized, as well as, unsubsidized operations.

Moreover, States maintains that Section 805(a) is designed to protect operators who furnish domestic services (which do not include foreign ports); however, from 1958 to February 1961 vessels operated by Matson in the California-Hawaii service called at British Columbia. Although these calls to British Columbia terminated in February 1961, these voyages were made prior to States' filing for increased sailings under Section 805(a) and should be considered in determining whether Matson has an "exclusive domestic" status. States concludes that the status of exclusive domestic operators cannot be applied to each separate and distinct service and that on the basis of integrated operation with Oceanic in our foreign commerce and by reason of Matson having served foreign ports, that Matson is not, in fact, an "exclusive domestic operator."

Matson, to the contrary, concludes that for the purposes of a Section 805(a) proceeding, it is an "exclusive domestic operator" in its California-Hawaii trade and that its connection with Oceanic does not change this status. The question was laid to rest, Matson concludes, in the *PFEL*[4] case, where Matson was held to be an "exclusive domestic operator" despite such connection with Oceanic.

We think Matson operates an exclusive domestic service between California and Hawaii within the meaning of Section 805(a) of the Act and that it is entitled to the hearing-procedure

4. Pacific Far East Line Inc.,—Sec. 805(a) calls at Hawaii, 5 F.M.B.—M.A. 287, 297 (1957).

protection provided by the section. States' arguments to the contrary were considered by the Board in States' application under Section 805(a) for one additional call to Hawaii, Docket S-128 (1961) wherein the Board concluded that Matson is a corporation operating exclusively in the coastwise or intercoastal service and that its California-Hawaii service is exclusive within the meaning of Section 805(a). Also, on appeal from the decision of the Federal Maritime Board in the *PFEL* case, 275 F. 2d 184, the Court did not take issue with the Board's finding that Matson had standing as an "exclusive domestic operator" entitled to the protection provided in Section 805(a). Accordingly, for the purposes of this proceeding, we conclude that Matson is an "exclusive domestic operator" entitled to the protection afforded by the section with respect to the need to hold a hearing to determine if applicant's proposed service would constitute unfair competition or would be prejudicial to the objects and policy of the Act.

3. *Unfair Competition*

States and Matson are sharply divided on the question whether an increase of sailings by States from 13 to 26, annually, would constitute unfair competition, as contemplated in Section 805(a) of the Act. States, supported by San Diego, concludes that such increased sailings do not constitute unfair competition. Matson, Hawaii and Public Counsel conclude to the contrary. The Hearing Examiner found and concluded (save as noted in his ultimate findings respecting service from San Diego) that the granting of the application would result in unfair competition to Matson, within the meaning of Section 805(a) of the Act.

In our opinion, those who conclude that the proposed increased sailings would constitute unfair competition do so on the theory that operators engaged exclusively in the domestic trade are "fundamentally entitled" to carry the trade and, as a matter of law, must be shielded from competition by subsidized operators. We do not agree, as discussed below, that this doc-

trine applies in this case and we conclude that it would not constitute unfair competition to grant this application.

The heart of States' position is that the proposed increased sailings would not constitute unfair competition, as a matter of law, because Congress has authorized subsidized operators to engage in the domestic trade on condition that they repay a certain portion of the construction-differential subsidy and that they abate operating-differential subsidy when they engage in such trade; and, further, that the Board has no more power to say that Congress did not extract enough than it does to say that the domestic trade reduction is excessive. States contends that Matson is hardly in a position to claim unfair competition. It argues, that by its monopoly, Matson has blanketed the attempts of all operators to compete; that Matson's shipping monopoly is impenetrable because of a vast corporate interlocking with hundreds of companies which wield enormous economic power throughout the Hawaiian Islands, enabling Matson to carry 92 per cent of the cargo westbound and 98 per cent of the volume eastbound, for a total of 95 per cent of the trade.

Matson contends, to the contrary, that the measure of unfair competition is determined best, not by the continuing ability of the unsubsidized operator to compete for available traffic, but by the advantages which remain with the subsidized operator even after repayment and abatement of subsidy under Sections 506 and 605(a) of the Act. In particular, Matson concludes that unfair competition would result if States is permitted to increase sailings, as proposed, because the subsidy which States has already received has permitted it to build and operate new Mariner-type ships which Matson cannot afford because each one of the vessels costs about $12 million, whereas, Matson's aggregate worth in vessels now amounts to about $15 million total. Even on this amount of investment, the rate of return is inadequate. Refund

of subsidy, Matson maintains, does not offset the financial economic advantages derived from deferred tax benefits, use of capital reserve funds and the purchase of vessels with deferred funds. In effect, Matson contends that the subsidy money which States would pay back to the government for that portion of its mixed voyage engaged in the domestic trade would amount to interest free loans.

Further, Matson argues that the grant of permission to increase sailings would constitute unfair competition because the basic expenses of the mixed foreign and domestic voyages will be borne by subsidy, rather than by capital expenditures by the operator, as is the case with Matson. This is indicated by States' use of the incremental accounting formula for its existing California-Hawaii voyages from 1959 through 1961 which showed that States' average profit was $14,000. Matson argues that if a full cost absorption accounting formula were used, financial reports on existing services would have disclosed a loss. It concludes that the Act contemplates a full absorption accounting system with a separation between the domestic and foreign legs of the mixed voyage. This would enable a comparison to be made between subsidized and unsubsidized operators and the costs to each for providing service on the domestic leg.

The question of the meaning and intent of the term "unfair competition" in Section 805(a) has arisen with greater frequency and has become more intensely debated in recent years than previously. This is true, perhaps because trade is increasing with Hawaii, Alaska and Puerto Rico, in particular, and offshore possessions in general. Hawaii and Puerto Rico are in direct line with foreign ports served by our subsidized carriers and it is understandable that with a growing economy, in these and other areas, subsidized carriers would wish to serve this trade en route to foreign ports. It is perhaps timely, then, to examine in some depth the intent of Congress in requiring the Board to make

findings with respect to unfair competition and with respect to whether mixed voyages by our subsidized carriers would be prejudicial to the objects and policy of the Act.[5]

Section 805(a) is addressed to the proposed operation of "any contractor" or any holding company, subsidiary, affiliate or associate of such contractor or charterer or any officer, director, agent or executive thereof who intends to operate vessels in the domestic intercoastal or coastwise trade. So extensive a listing of operators required to obtain permission from the Board before they may operate in the domestic trade, makes apparent the broad scope of the Board's authority in these proceedings. Further, although the words "public interest and convenience" appear in the proviso in Section 805(a), a complete reading of the section indicates that the Board has the obligation to weigh questions of unfair competition and prejudice to the objects and policy of the Act in the light of what it considers to be in the public interest and convenience. Unlike other provisions of the Act (such as Section 605(c)), the Congress has authorized the Board to view the entire competitive relationships involved and determine, in its unrestricted judgment, how the public interest will be served best.

Clearly, then, the Congress intended for the Board to have wide discretion to determine what was in the public interest with respect to service in the coastwise or intercoastal trade when the Board was asked to judge (after intervention from persons operating exclusively in such trade) whether the proposed service would amount to unfair competition or would be prejudicial to the objects and policy of the Act.

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5. The discussion of unfair competition in this case very closely parallels the discussion of the same subject in Maritime Subsidy Board Dockets Numbers 140 and 141 which involved very similar issues and were considered at the same time as this case.

In fulfilling its responsibility to make these determinations within the broad discretion given to it by the Congress, the Board is mindful of the effect of sections 506 and 605(a) which to a degree—an important degree—abate the privileges and advantages provided to our subsidized operators in order for them to compete with foreign-flag carriers. We consider, then, that any finding the Board would make with respect to unfair competition would need to be based on evidence that the resulting advantage of the subsidized operator over the operator engaged exclusively in the coastwise or intercoastal service is such an overwhelming, unconscionable advantage as to constitute "unfair competition." Such determination must be based on the facts and circumstances involved and not on any issue of law since Congress has provided a formula to repay construction-differential subsidy and abate operating-differential subsidy as a condition of subsidized operators engaging in the domestic trade.

The Circuit Court of Appeals in the *PFEL* case 275 F. 2d at 186, construed the unfair competition clause in Section 805(a) as requiring a showing of (1) fraudulent competition (2) cut-throat competition or (3) competition in any way unfair according to accepted legal or ethical standards. It is true that the Court's construction of the term unfair competition in that case was applied to a factual situation materially different than exists in this case. But, it is not true that the Court's construction of this phrase does not apply in this case because, in our opinion, the Court was applying a standard that could be used in any of the cases under Section 805(a) where the Congress has given to the Board the discretion to decide in the public interest what is fair competition and what is not fair competition. Accordingly, we adopt the Court's view in the *PFEL* case, not as a view which we feel we must follow, but as a view which we think we should follow.

Even in the absence of the *PFEL* doctrine on unfair competition, we do not believe there is unfair competition, in fact, in States' proposed operation because the abatement of subsidy, together with the statutory and contractual restrictions imposed upon companies operating pursuant to subsidy contracts, tend to equalize the advantages over unsubsidized operators, which accrue from such contracts. Also tending to equalize such advantages, is the fact that domestic intercoastal and coastal operators, such as the intervenor herein, are and have been recipients of government aid in various forms and in substantial measure such as the trade-in and build vessel exchange and cargo preference programs.[6]

Also debated in this proceeding, was the question whether the so-called "fundamentally entitled" doctrine was relied on by the intervenor and, if so, whether the Court in the *PFEL* case repudiated this doctrine. Applicant says that the intervenor relies on this doctrine and that the doctrine has been repudiated. The intervenor says that it does not rely on the doctrine but relies instead on the plain intent of Congress to provide protection to operators exclusively engaged in the domestic trade and that where a subsidized operator entering the domestic trade would have any competitive advantage over the domestic operators this would result in unfair competition. Otherwise, the intervenor says, the protection intended to be provided in Section 805(a) would be a fiction.

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6. The fact that States' service to Hawaii can pay for itself on an incremental cost basis only is a strong argument for finding that the service would constitute unfair competition, as contended by Matson, but it is emphasized that this is only one factor to be weighed in the balance and is not controlling as a matter of law. There is no law, of which we are aware, requiring that proposed service shall be approved only if it satisfies a full cost absorption theory. If there were such a requirement then States' existing service of 13 sailings, annually, in the California-Hawaii trade would be illegal, since the service does not now satisfy full cost absorption requirements. No such finding of illegality has been made—and so far as we have been able to determine, neither Matson nor anyone else contended to this effect when Pacific Transport Lines, Inc. States' predecessor, was authorized to make these 13 sailings.

If there is any question left on the point, we do not believe that operators exclusively engaged in the domestic intercoastal and coastal service are "fundamentally entitled" to protection from subsidized operators. There would be no need for a proceeding under Section 805(a) to determine whether the amount of competition proposed by subsidized operators is unfair if the domestic operators were entitled to such a degree of protection. Also, we do not agree with intervenor, Matson, that such benefits as subsidized operators receive from the government, not accruing to domestic operators, create a *prima facie* case of unfair competition. We do believe, however, that Congress intended to provide substantial protection for such domestic operators and in cases where the advantages of the subsidized operators are so great as to make it unlikely that the domestic operators would be able to compete effectively, then a finding of unfair competition with respect to the proposed service should be found.

The amount of protection required in relation to the remaining advantage of the subsidized operator is, in our opinion, a matter of judgment to be exercised by the Board, depending on all the circumstances.

In view of the predominant, almost monopolistic, competitive position Matson enjoys in the California-Hawaii trade, we do not find a need for such a degree of protection and we do not find that States would have such a degree of advantage over Matson as would make it likely that Matson could not continue to compete effectively for available cargo.

Accordingly, based on all the facts and circumstances of this case, we find that the proposed increase of 13 sailings would not constitute unfair competition to Matson, within the meaning of Section 805(a) of the Act.

4. *Whether it would be Prejudicial to the Objects and Policy of the Act to Grant States' application*

In Dockets Numbers S-140 and S-141 (Grace Line Inc., American Export Line, Inc. U.S. Atlantic-Puerto Rico Service) decided by the Maritime Subsidy Board on October 18, 1963, but considered by the Board at the same time as the case now pending, it was held that:

> "the Congress intended for the Board to have wide discretion to determine what was in the public interest with respect to service in the coastwise or intercoastal trade when the Board was asked to judge (after intervention from persons operating exclusively in such trade) whether the proposed service would amount to unfair competition or would be prejudicial to the objects and policy of the Act."

Further, it was held with respect to the Grace application that, although the proposed freight ship service would not amount to unfair competition, it would be prejudicial to the objects and policy of the Act, indicating thereby that the Board considered these two provisions of Section 805(a) to be disparate requiring separate and independent judgment. Although the Board felt it would be necessary to show that the service proposed by a subsidized operator would result in an overwhelming, unconscionable advantage over the unsubsidized operator as to constitute "unfair competition," it decided that the amount of protection required for the unsubsidized operator in relation to the remaining advantages of the subsidized operator was a matter of judgment to be exercised by the Board depending on all the circumstances.

The Board decided in Docket No. S-140 that the service proposed by Grace would be prejudicial to the objects and policy of the Act because of the grossly disproportionate distribution of domestic to foreign trade that would result if Grace's application had been granted. The Board found this could not be justified under Congressional mandates to subsidize our merchant fleet to compete more effectively with foreign-flag vessels. The Board also found that existing and potentially required service was adequate (noting that 7 different steamship companies were pro-

viding the required service and that Grace's entry into the trade might cause such overtonnaging as would result in the failure of some of the existing non-subsidized carriers to stay in business) and concluded that there was no *need* for Grace's proposed service in the trade between U.S. Atlantic ports and Puerto Rico.

The findings in the *Grace* case are noted because the question may properly be raised why the Board concluded in that case that it would be prejudicial to the objects and policy of the Act to permit the proposed service and why it concludes in this case (which involves many of the same questions as the *Grace* case) that the proposed service by States Steamship Company would not be so prejudicial.

As we have indicated, we feel that the amount of protection required by an unsubsidized operator engaged exclusively in the domestic trade must be judged in the light of all of the surrounding circumstances and the justification for the proposed service can (and in this case it does) vary depending on the circumstances.

Eighty per cent of Hawaii's population inhabits Oahu. Seventy per cent of all cargo is handled at Honolulu. Trans-shipments to neighbor islands are accomplished by barges. Ninety-nine per cent of the cargo in 1960, moving in and out of Hawaii, moved between Hawaii and the mainland. One per cent of the cargo moved to the Far East, mostly to Japan. In the last decade, the population increased 26 per cent and it is expected to continue to increase, with an expanding economy of 5 to 10 per cent, annually, stimulated by recent statehood.

Over the last decade, and more, Matson consistently has carried about 98 per cent of the cargo between Hawaii and the Pacific Coast. It carries about 92 per cent of all berth liner cargo. In 1961 it carried approximately 1.5 million tons of cargo, 80 per cent of which was discharged at Honolulu. Eastbound Matson lifted approximately 1.3 million tons of cargo at Honolulu, over

90 per cent of which was discharged in the San Francisco area. Matson carries most of the pineapple crop. In 1960 it carried in their entirety all of Hawaii's sugar and molasses products eastbound to California. In the near future, Matson plans to have a lift capacity of about 2½ million measursement tons, annually, and the company contemplates about 92 per cent utilization of its vessels.

Matson has engaged in the Hawaii trade for about 80 years. It has invested large sums in shore facilities and equipment to handle huge amounts of cargo under its extensive containerization program. Through intimate and complex business relationships, Matson is closely associated with major producers and shippers of freight and through these same affiliations has terminal and stevedoring services performed for them both in Hawaii and on the mainland.

Pacific Transport Lines, Inc., States' predecessor, began to make calls at Hawaii in 1950. When Pacific Transport Lines became subsidized in January 1953, it received Section 805(a) permission to continue making 13 calls at Hawaii, in each direction.[7] States acquired the Company in 1954 and merged with it in 1957. Initial permission to States to serve the California-Hawaii trade was limited to C-3 vessels. Later this permission was extended to Mariners.

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7. In *May 1952,* Pacific Transport Lines, Inc. applied under Section 805(a) to have permission to continue its service to the Hawaiian Islands while receiving subsidy to operate on Trade Route 29. (An operating-differential subsidy agreement for service on Trade Route 29 was executed December 1952). In addition, in the same proceeding, permission was requested to permit the Company's largest stockholder to continue to own stock in Matson Navigation Company. A public hearing was held in which Matson and Pacific Far East Line, Inc. intervened but did not oppose continuation of Pacific Transport Lines, Inc.'s continued Hawaiian service. The Examiner found on the 805(a) issues that continuation of the Hawaiian service was granted, until further order of the Board. He concluded that under the existing conditions, granting of permission would not result in unfair competition and would not be prejudicial to the objects and policy of the Act. (4 F.M.B. 146).

Since 1950 the annual maximum westbound cargo carried by applicant has not exceeded 23,000 short tons. Eastbound carryings have been substantially less. In each direction, States calls only at Honolulu. Cargo from the neighbor islands is handled by a local cargo tug and barge service, which will not be changed if the application is granted.

The record discloses a steadily increasing and expanding economy in Hawaii and the amount of cargo in the California-Hawaii trade is anticipated to increase from 5 per cent-10 per cent annually. There is persuasive evidence showing that Matson, running almost continuously over 90 per cent capacity has frequently shut out cargo and required shippers to wait as much as 10 days or more to have their cargo lifted.

Accordingly, we do not feel that States' additional sailings will over-tonnage the trade but instead will help remedy some of the tightness of Matson's closely run service.

We are not persuaded by Matson's contention that States will engage only in "cream skimming" shipping practices. Even if this were the case we do not believe that the amount of additional sailings by States will have such competitive effect on Matson as to lessen substantially the ability of Matson to compete for available cargo.

As noted, Matson has a tremendous advantage in obtaining cargo and controlling much of that which is shipped eastbound, to the exclusion of competitors. States does not solicit cargo eastbound and it only carries, westbound, that amount of cargo which Matson is not able to accommodate, since there is evidence in this record to show a scarcity of space aboard Matson ships going westbound. This is apparent from the unusually high utilization of Matson's capacity and complaints indicating that Matson's services do not fully meet the needs of many shippers.

There is little reason to believe, as Matson contends, that States will survive in the domestic portion of its mixed voyage

only by charging sub-standard rates. States has specifically said that it will follow Matson's rates which are and should be the prevailing rates because Matson is the unquestioned predominant carrier in the trade. Without the necessity of seeking permission, Matson has the flexibility to control its fleet, unlike States, to meet changing circumstances. These factors are important in judging the question of the extent to which Matson's trade needs to be protected against competition from a subsidized carrier within the overall public interest considerations of Section 805(a).

In weighing all the evidence in the case, the one pervading factor is the size of Matson's operations in the California-Hawaii trade in relation to the service proposed by States. By increasing the number of sailings from 13 to 26 annually, as proposed, it is expected that the total diversion of cargo from Matson would not exceed 67,000 tons. Without further growth in the Hawaiian economy, that amount of diversion would not equal 5 per cent of Matson's westbound tonnage and only slightly more than that eastbound. If the Hawaiian economy expands only to the extent conservatively estimated, that amount of diversion would not equal the resulting annual increase in cargo. For each sailing by States every two weeks, Matson will have approximately 14 sailings each month. Based on cargo lifted in 1961 (but not including the tonnage that would be diverted if the application is granted), Matson during the course of a year would carry 22 times as much cargo as States and would do so on only 5 times the number of sailings.

Keeping in mind that Section 805(a) requires the Board to make an *affirmative* finding that the proposed service would be prejudicial to the objects and policy of the Act before it can deny permission to a subsidized operator to engage in the domestic trade, we find it difficult to conclude that Matson requires such protection as to deny States permission to increase sailings where

the amount of cargo that would be moved by States under the increased sailings plan would be 5 per cent of the total cargo moving in the California-Hawaii trade as compared to 95 per cent carried by Matson.

Another important factor in weighing the total public interest considerations here is shipper interest.

Understandably, Matson relies heavily on the views of a number of shipping associations (that the service provided by Matson between Hawaii and the mainland is adequate) as reason why States' application should be denied. In this connection, Matson points to the opposition of the State of Hawaii to the proposed increased sailings by States.

The State of Hawaii is opposed to States' proposed additional calls because of "the possible increase in the level of rates in the Hawaiian trade as a result of the 13 additional calls." Hawaii's position is based on what it considers the long term effect on the economy of the State, and not the short term benefits that may be derived from competition. Despite the fact that freight rates already "are very high" according to Hawaii, such rates can rise even higher if the proposed competition is permitted because "it is quite likely that Matson's profit position would deteriorate" due to the competition, which would have the effect of loss of tonnage, lower capacity utilization, increased unit costs and ultimately a need for higher rates to compensate for loss of business. Eschewing competition as a factor in maintaining rate levels, the State of Hawaii concludes that protection from "the evils that we find under the monopoly situation that Matson enjoys," is provided by the fact that Matson is a regulated company (by the Federal Maritime Commission).

It is perhaps an understatement to say that Hawaii's position is unique in proceedings of this kind. Typically, in such proceedings, public representatives argue for more service, to be provided by as many competitors as possible, as a means not only to in-

crease service but as a check valve on rates should one carrier gain unusual strength in the trade. Usually, in such proceedings, the Subsidy Board, in common with regulatory commissions faced with the same question, discounts to a degree the exhortations of such public representatives for more and more service for the same reason that Hawaii argues in this case that we should deny States' application, viz., that in the long run effective competition may be dissipated if there is not enough cargo for all the existing carriers to remain in business.[8]

Whatever merit there may be to Hawaii's long-range public interest view favoring regulation to competition as a means of controlling rates, the theory does not apply in this case. Matson has a virtual monopoly of the trade.

According to Hawaii, rates are very high, already. The logical conclusion from this set of circumstances is that regulation alone has not controlled rates and that competition might.[9]

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8. Indeed, this was the Board's view in the Grace application Docket No. S-140 where the Commonwealth of Puerto Rico and many shippers and consignees supported Grace's application for additional service. The Board said:

> "We do not question the sincerity of Grace and its supporters, but it must be recognized that shippers, consignees and Chambers of Commerce will naturally favor bigger and better shipping facilities. We are satisfied that these intervenors and the Commonwealth of Puerto Rico sincerely believe that it would be to their advantage to approve Grace's application. On the other hand, they should also consider the possible long-range adverse effects that Grace's entry into the trade might carry with it, such as over-tonnaging, resulting in rate increases, and possible failure of existing carriers to stay in business. These results are not foregone conclusions but caution requires us to weigh them against the short range benefit resulting in the immediate increase in service that would follow from granting Grace's application."

9. The Board's view in the Grace case, Docket No. 140 on the possible long range enervating effects of competition must be distinguished from the Board's view in this case (which is that increased competition would not prejudice the objects and policy of the Act) because the facts and circumstances are materially different in the two cases. In the Grace case, *many* carriers were providing service already, the service was overtonnaged, or nearly so, without Grace's additional service; and, the rates between the

In this connection, for what must be concluded to be the coup-de-grace to Hawaii's position, we find Matson arguing that States will charge sub-standard rates and States arguing that it will hold prices up to that of the leader, Matson. If events proved Matson's prediction more accurate, then Hawaii would have lost the advantage of more service at lower rates if the application were denied (accepting as a predicate that Matson would not lose its effectiveness to compete in the trade since Matson has a virtual monopoly of service, which would not be materially diminished if the application were granted). If, on the other hand, States were to hold up its prices comparable to Matson's, then Hawaii would have the advantage, at least, of increased service.

For these reasons we do not follow the argument of the State of Hawaii (which was made specifically on behalf of shipping interests in Hawaii) to oppose States' application to increase sailings and, therefore, we reject such argument as reason not to authorize the additional sailings.

With respect to other shipper interests, the record shows that Matson discontinued service at San Diego in 1962. States called there four times in 1960 and seven times in 1961. The area has experienced a very marked growth in the past few years, principally because of military activities and the desire of people to live there after retirement. The San Diego area and Hawaii have a common interest arising from important military installations at both places and commercial compatibility. Imperial Valley, east of San Diego, is the seventh most productive agricultural county in the United States. It competes with the San Joaquin Valley, which runs from Bakersfield north to Sacramento, and therefore it is necessary that producers in the Imperial Valley have attractive ocean rates from San Diego to compete with pro-

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mainland and Puerto Rico were relatively low because of substantial competition. These circumstances are contrasted with the States-Matson case here, where Matson has a virtual monopoly of service and rates are considered to be very high by the shipping and consignee interests in Hawaii.

ducers who use more northerly ports. Greater opportunity for States to engage in the Hawaii trade likely would provide sufficient cargo for regular calls at San Diego, coupled with in-and-out Far East cargo. It is possible, even, that regular calls would generate additional cargo in both Hawaii and the Far East. These distinct possibilities not only do not prejudice the objects and policy of the Act, they promote them.

By providing direct service to San Diego, States' service will not only open service to a port lacking service but will aid in the needs of national defense in facilitating movements of military cargo from an important military base to outlying defense areas in the middle of the Pacific Ocean and the Far East.

Increasing the number of sailings will increase the opportunity for generating more combination cargo to Hawaii and the Far East from the mainland and from Hawaii, thus opening up the Pacific Basin to trade in goods similar to both cultures, in many respects. There is no evidence to establish that in the past States has, nor in the future, States will subordinate its obligation to serve the foreign trade for the benefits to be derived in the domestic trade.

States, and its predecessor, have operated for 40 years in the transpacific trade and for the last 12 years in the Hawaii trade. It is party to an operating-differential contract with the Government running to 1978. We consider, as States has maintained, that it makes good business sense to stop at Hawaii "on the way" to and from the Far East. Such by-the-way trade is helpful to shippers on both the mainland and Hawaii. It reduces operating-differential subsidy to States, estimated to be $800,000 annually. The ratio of domestic to foreign trade would not be so disproportionate as to run counter to subsidy concepts which are designed primarily to permit our flag carriers to compete effectively with foreign carriers in the foreign trade. The adverse effect on unsubsidized domestic operators (Matson in this case) is not so

substantial as to seriously affect Matson's ability to compete for available cargo; therefore, we conclude that permitting States to increase its sailings to Hawaii would not be prejudicial to the objects and policy of the Act.[10]

CONCLUSIONS

Based on the full record in Docket No. S-121, the Maritime Subsidy Board finds and concludes that:

1. Section 805(a) is applicable in this proceeding and that, therefore, States Steamship Company is required to have written permission from the Board before it may increase its service between California and Hawaii as proposed;
2. Matson is exclusively a domestic operator within the meaning of Section 805(a) of the Act;
3. States' proposed service would not constitute unfair competition with Matson within the meaning of Section 805(a) of the Act;
4. It would not be prejudicial to the objects and policy of the Act to grant States' application for increased sailings.

SO AUTHORIZED.

By The Maritime Subsidy Board

/s/ JAMES S. DAWSON, JR.
Secretary

10. Unlike the related case with Grace in Docket No. S-140, where the Board concluded, in effect, that Grace would lose its essential character as a subsidized carrier *in the foreign commerce* and where the Board found that Grace's service would over-tonnage the trade, was not needed, and would seriously affect existing domestic carriers in the trade, none of which had the absolutely dominant position in the Atlantic ports-Puerto Rico trade as Matson has here in the California-Hawaii trade.

Appendix C

The full text of Section 101, Merchant Marine Act, 1936, (46 U.S.C. 1101) is as follows:

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The full text of Section 506, Merchant Marine Act, 1936, (46 U.S.C. 1156) is as follows:

SECTION 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the

gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

The full text of Section 605(a), Merchant Marine Act, 1936, (46 U.S.C. 1175) is as follows:

SEC. 605. (a) No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the Great Lakes or on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade.

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No. 525

In the Supreme Court of the United States

OCTOBER TERM, 1968

MATSON NAVIGATION COMPANY, PETITIONER

v.

C. R. SMITH, SECRETARY OF COMMERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF COMMERCE IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 1) is reported at 394 F. 2d 514. The memorandum opinion and order of the district court (Pet. App. 3–27) is reported at 258 F. Supp. 144.

JURISDICTION

The judgment of the court of appeals (Pet. App. 2) was entered on May 17, 1968. A timely petition for rehearing was denied on June 21, 1968 (Pet. App. 2). The petition for a writ of certiorari was filed on September 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Secretary of Commerce reasonably interpreted § 805(a) of the Merchant Marine Act, 1936, 46 U.S.C. 1223(a), in ruling that the granting of the application of a subsidized operator to carry cargo to domestic ports in the course of its foreign-trade voyages will constitute "unfair competition" to a non-subsidized operator in the domestic trade only if the subsidized operator will thereby gain a substantial competitive advantage over the unsubsidized operator by virtue of the receipt of subsidy.

2. If the Secretary's standard is permissible, whether his conclusion, that the granting of States Steamship Company's application for permission to increase its calls at Hawaii would not give States a substantial competitive advantage over petitioner, is supported by substantial evidence and adequate findings.

STATUTES INVOLVED

Section 805(a), Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223(a), is set forth in full in the Appendix to the Petition, pp. 86–87. Section 101 of the Act (46 U.S.C. 1101), Section 506, as amended (46 U.S.C. 1156), and Section 605(a), as amended (46 U.S.C. 1175(a)) are set out in Appendix C to the Brief of Respondent States Steamship Company in Opposition to the Petition.

STATEMENT

This action was brought in the United States District Court for the Northern District of California by petitioner Matson Navigation Company. Petitioner sought to have set aside a determination of the Secretary of

Commerce (Pet. App. 28–85) granting respondent States Steamship Company, a subsidized operator in foreign commerce, permission to increase its intermediate service between California and Hawaii by vessels engaged in the California-Far East Trade from 13 to 26 trips annually in each direction. The Secretary's decision brought to a close four years of administrative proceedings, which had produced four previous administrative decisions and a transcript of 7,718 pages (Pet. App. 5). The district court upheld the Secretary's determination in a comprehensive opinion (Pet. App. 3–27), which the Ninth Circuit adopted *per curiam* (Pet. App. 1–3).

Under Section 805(a) of the Merchant Marine Act of 1936 (46 U.S.C. 1223(a)), the Secretary was required to decide whether granting States authority to double its Hawaii callings would result in "unfair competition" to Matson,[1] which "[o]ver the last decade or more * * * consistently has carried about 98% of all cargo between Hawaii and the Pacific Coast" (Pet. App. 59). Because it operates in foreign commerce, States receives both a "construction-differential subsidy" ("CDS"; 46 U.S.C. 1151) and an "operating-differential subsidy" ("ODS"; 46 U.S.C. 1171) to help it compete with foreign lines enjoying lower costs. Sections 506 and 605(a) (46 U.S.C. 1156, 1175(a)) require refund of these subsidies, in amounts proportional to the revenue derived, in certain cases in

[1] Section 805(a) refers to a person "operating exclusively in the coastwise or intercoastal service." In the administrative proceedings and the courts below, States contended unsuccessfully that Matson did not so operate (see Pet. App. 46–51).

which subsidized vessels stop at intermediate American ports, including Hawaii, to take on or discharge domestic freight in the course of a voyage in foreign trade. In arguing that States' extended service would be "unfair competition," Matson contended that these refunds were insufficient to dispel the competitive advantage States acquired from the subsidies and that any such residual benefit constitutes "unfair competition" as a matter of law; alternatively, it contended that the size of this "residual subsidy" alone should determine the issue. States, on the other hand, sought to confine Section 805(a) to cases where one operator uses subsidized and unsubsidized ships in wholly foreign and wholly domestic trade, respectively. Where one vessel is used in mixed trade, calling as States' do at domestic ports en route to or from foreign ones, States' view is that Sections 506 and 605(a) specifically authorize this trade on the single condition that the required refunds are made; in this case, it says, Congress has determined what steps will eliminate "unfair competition," and there is no need to resort to Section 805(a).

The Secretary's thorough opinion rejected both positions (Pet. App. 32–68). He found that mixed trade voyages such as States' are subject to the requirement of Section 805(a); but that "unfair competition" is to be measured not mechanically, as petitioner wishes, but by consideration whether the situation, taken as a whole, reveals that a "substantial competitive advantage to the subsidized operator" would result (Pet. App. 58). The Secretary then made extensive findings concerning whether the "over-all

picture" showed such an advantage, and found that it did not (Pet. App. 56–68). Among the factors he considered in reaching this conclusion were that Matson presently enjoys a virtual monopoly of the California-Hawaii trade (Pet. App. 58–60); that States' carryings, even under the projected increase in its service, would be only about 5 percent of Matson's tonnage (Pet. App. 59–60); that the extent of residual subsidy was considerably less than Matson projected—specifically, that only 29.3 percent of the amount of subsidy originally allocated to the California-Hawaii leg of States' California-Orient routes would be left after the required refunds to help carry on that segment cargo that is 61.5 percent foreign by volume (Pet. App. 61–64); and that any impact of such a residue would be lessened by statutory and contractual restrictions upon subsidized contractors and substantial government aid in various forms available to domestic operators (Pet. App. 67; *infra,* n. 10).

The Secretary further noted that even Matson's statistics show yearly growth in California-Hawaii trade of at least 1 to 2 percent (Pet. App. 67–68), and thus that within 5 years Matson would be carrying as much cargo as it does now (Pet. App. 68). He also noted signs that Matson was presently unable to provide adequate service (Pet. App. 75–78), and that (Pet. App. 79) "the proposed increased States' service at this juncture offers promise of remedy for the 'tightness of Matson's closely run service'. * * *." Finally, in granting States' application, the Secretary provided that "at the expiration of a three-year period, the Maritime Administration will take prompt

steps to schedule an appropriate (and expeditious) proceeding in order to determine on the basis of accrued actual experience whether the authorization for 26 States voyages, or any part thereof, should continue in effect" (Pet. App. 85).

ARGUMENT

The ruling below, sustaining the granting by the Secretary of Commerce of States Steamship Company's application for increased calls at Hawaii, is clearly correct, and is not in conflict with any decision of any other court of appeals. Moreover, the Secretary's ruling, by its terms, calls for further administrative proceedings to review whether States authority for increased service is to be continued. Petitioner therefore will have further opportunity to support its claim of "unfair competition," found lacking in merit on the present record, with evidence based upon "accrued actual experience" (Pet. App. 85). Accordingly, further review by this Court is unwarranted.

1. The basic issue is whether the Secretary exceeded his discretion in construing the words "unfair competition" in Section 805(a) to require a determination that grant of an application to engage in domestic freight operations will give a subsidized operator a "substantial competitive advantage" over domestic operators by reason of his subsidy. In arguing that the proper standard is whether a subsidized operator experiences any residual subsidy benefit, petitioner fails to recognize the deference properly due to administrative construction of the statute, neglects im-

portant features of the statutory scheme, and wrongly claims support from and conflict with prior judicial and administrative decisions.

The interpretation by the agency charged with administering the statute may be overturned only if clearly contrary to the manifested intention of Congress. *E.g., Udall* v. *Tallman,* 380 U.S. 1, 16; *Unemployment Comm'n* v. *Aragon,* 329 U.S. 143, 153–154. Here Congress has directed the Secretary to determine whether the granting of an application will result in "unfair competition," but has not attempted to define that term. The very breath of the term indicates a broad discretion in the Secretary in defining the kinds of situations which constitute "unfair competition". *E.g., Mitchell* v. *Budd,* 350 U.S. 473, 480; *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297.

Section 805(a), as any subdivision of a major statutory scheme, is to be read in the context of the whole. In this case, the relevant whole—the Merchant Marine Act of 1936—includes Sections 506 and 605(a); these specifically recognize the possibility of mixed trade voyages in, *inter alia,* the California-Hawaii trade, and provide at least a partial remedy for the subsidy benefit problem by requiring *pro rata* refunds. In view of this explicit acceptance of mixed trade voyages stopping at Hawaii, it can hardly be fatal to an application under Section 805(a) that the applicant owns vessels used in the Pacific "and that subsidy helped build them and put them there," as petitioner implies (Pet. 13–14). Although Congress was aware that residual subsidy benefits might re-

main after payment of the Section 506 and 605(a) refunds, it gave the Secretary flexibility to deal with such situations instead of flatly prohibiting the granting of applications of any subsidized operator who would retain a benefit.[2] As the district court stated (Pet. App. 18):

> Cognizant of the dual objectives [*i.e.*, 1) the maintaining of an effective Merchant Marine and 2) the protection of exclusively domestic operators against severe disadvantage by virtue of subsidies to competitors] and unrestricted by specific statutory mandate or judicial precedent, the Secretary correctly rejected a mechanical test of unfair competition. Rather, having concluded that the Act vested in him a wide range of discretion, the Secretary properly adopted a standard which was flexible enough to implement his discretion but restricted enough to substantially preserve in all cases the obvious protective intent of Section 805(a).[3] * * *

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[2] See the testimony of J. C. Peacock, Director of the U.S. Shipping Board Bureau, Department of Commerce, Hearings before Senate Committee on Commerce on S-3500, 74th Cong., 2d Sess. (1936), pp. 75–76, quoted by the district court (Pet. App. 15, n. 12).

[3] The legislative history relied upon by petitioner for the opposite conclusion (Pet. 16–19) supports the Secretary's position. The Farley Report (H. Doc. 118, 74th Cong., 1st Sess. (1935) and Black Committee Report (S. Rep. 898, 74th Cong., 1st Sess. (1935)) dealt with two serious abuses of subsidies: (1) the creation by recipients of mail subsidies of subsidiary or affiliated corporations to operate in the domestic trade, to which the subsidized parent could divert subsidy funds, and (2) subsidy payments to almost exclusively domestic operators, who touched at foreign ports only incidentally in the course of their domestic routes. The district court fairly summarized the thrust

The last paragraph of Section 805(a) does not support petitioner's view. It deals with diversions of funds *after* permission for mixed operations has been granted. As respondent States points out, it was more likely meant to deal with the improper shuffling of funds between domestic and foreign operations which had been the prime concern of the Black and Farley Reports. It, too, must be read with Sections 506 and 605(a), and the apparent congressional acceptance of some residual subsidy benefit in mixed trade voyages. Moreover, it provides criminal, not civil enforcement; it cannot be assumed in advance that States will commit a misdemeanor by engaging in such "diversions."[4] *Seatrain Lines, Inc.* v. *Hodges*, 320 F. 2d 737, 741 (C.A.D.C.).

There is no present conflict of judicial or administrative decisions. Both the district court and the Secretary dealt at length with *Pacific Far East Line, Inc.* v. *Federal Maritime Board*, 275 F. 2d 184 (C.A. D.C.), certiorari denied, 363 U.S. 827 (Pet. App. 16–17, 54–57), correctly pointing out that that decision firmly

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of the legislative history (see Pet. App. 12–14), and properly concluded that "nothing in the legislative history * * * requires the conclusion that Congress thought 'unfair competition' necessarily would result from granting an 805(a) application to an operator seeking permission, while receiving subsidy, to serve one of the mixed foreign and domestic trades enumerated in Sections 506 and 605(a) when subsidy in any (for even something more than a de minimus) amount would remain, after proration, in the domestic segment."

[4] The Act provides for regular auditing of the books of subsidized operators to ensure that subsidies once granted are not misused. See 46 U.S.C. 1173(c).

rejected the notion—still lurking in the petition[5]—that Matson is "fundamentally entitled" to retain its near-monopoly of domestic trade against any subsidized operator.[6] The administrative decisions relied upon by the petitioner are based either upon this doctrine of "fundamental entitlement," now firmly laid to rest,[7] or upon an earlier decision in the present case, subsequently set aside and to be deemed of no precedential force,[8] or upon factual findings irrelevant to the present case.[9] In short, the Secretary's standard of "substantial competitive advantage" is reasonable and consistent with the statutory purposes, and Matson's charge that the administration of § 805(a) is

[5] Thus, petitioner rephrases the argument (Pet. 19–20) as "subsidized operators might be permitted to operate in the domestic trade in situations where there were no exclusive domestic services * * *."

[6] Although petitioner appears to assert (Pet. 24) that States engaged in such unfair practices as were condemned in *Pacific Far East Lines*, the Secretary found that States would not compete "fraudulently, in a cutthroat manner, or in a way that is unfair according to accepted generally applicable legal or ethical standards"; that finding was supported by substantial evidence (Pet. App. 23).

[7] See Pet. App. 56; *States Marine Lines, Inc.—Section 805(a) Application*, 1 S.R.R. (Pike & Fischer) 325 (1961). In the category of decisions relied upon by Matson, but dependent on the discredited doctrine of fundamental entitlement, see, *e.g.*, *Waterman S.S. Corp.—Section 805(a) Application*, 6 F.M.B. 115 (1960).

[8] *E.g.*, *American Export Lines—Puerto Rico Service*, 1 M.A. 285, 3 S.R.R. 898 (1964); *Grace Line, Inc.—Application to call at Puerto Rico*, 1 M.A. 284, 3 S.R.R. 870 (1964).

[9] *E.g. Pacific Far East Lines, Inc.—Section 805(a) Applications*, 4 F.M.B. 580, 595 (1955), where it was found that the grant "would seriously overtonnage the trade" and its "logical extension * * * would be the elimination of exclusively domestic operations."

"chaotic" is unfounded. The only administrative precedent the Secretary's decision rejects is that based upon the judicially-disapproved doctrine of fundamental entitlement.

2. There is a secondary issue whether, having decided upon the "substantial competitive advantage" standard, the Secretary correctly applied it to the particular facts of this case. This issue, involving only this case and already determined by two lower courts using appropriate standards for the review of administrative decisions, does not warrant further review. It is plain, moreover, that the Secretary considered all factors necessary to his determination, and that there is adequate support in the record for the conclusion he reached.

In particular, and contrary to petitioner's implication, the Secretary's opinion does deal with the approximate amount of residual subsidy benefit to States, in sufficient detail to show that it is small, and assumes, *arguendo,* the propriety of using a full-absorption method of allocating costs. (Pet. App. 61–65). While an exact resolution of accounting problems might be important in determining "substantial competitive advantage" in cases where competition among domestic carriers was already keen, the Secretary was not required to overlook Matson's monopoly position, or that even with the requested expansion States would have only 5 percent of Matson's cargo capacity, or that Matson could expect entirely to recoup any loss within five years. In these circumstances, it was sufficient to find, as he did, that any advantage would be small; that States' competition could not be ex-

pected to be "unfair" in the pejorative sense; and that there are equalizing forces which would help to counter any residual subsidy benefit to States.[10] As the district court noted (Pet. App. 20, n. 18) "although admittedly there may be some legitimate disagreement over the actual statistics, the ultimate conclusion that the competitive situation would not be greatly altered is clearly supportable by the record."[11]

In sum, the Secretary refused to allow the "over-all picture" of the competitive situation (Pet. App. 58–60) to become obscured by statistical and accounting contentions which in these circumstances were of only tangential importance to the resolution of the issue whether States obtained a "substantial competitive advantage" from residual subsidy. The correctness of

[10] As the Secretary was merely pointing out that even the "relatively small" advantage to States would be reduced by these factors, there was no greater need for precise calculation here. The factors involved are either statutory or occur in standard ODS agreements of which petitioner is thoroughly aware. Statutory restrictions on subsidized operators are found in §§ 803–805 of the Act, 46 U.S.C. 1221–1223. Advantages to domestic operators include insulation from foreign-flag competition (46 U.S.C. 883), construction financing provisions for vessels to be operated in domestic trade (46 U.S.C. 1159), trade-in and building incentives (46 U.S.C. 1160), and a construction-reserve fund benefit (46 U.S.C. 1161).

[11] Petitioner's other contentions are also without merit. For example, the Secretary's opinion adequately deals with the contention that States' application could be denied because of interest-free use of subsidies, or opportunities for tax deferment (Pet. App. 63–64). As the Secretary noted, these are advantages to *every* subsidized operator, yet the Act clearly contemplates that such operators may engage in domestic trade. The Secretary, moreover, carefully calculated the differences in interest costs (Pet. App. 62–63), and showed that they would not affect the result of the case.

this action is made especially clear by his call for additional administrative proceedings to review whether States' authority for increased service is to be continued. Petitioner will thus have an opportunity to attempt to support its charges of "unfair competition" on the basis of "accrued actual experience" (Pet. App. 85), rather than highly pessimistic statistical projections which the Secretary found to be unwarranted in many respects (*e.g.*, Pet. App. 61–62, 63 n. 1, 64, 70 n. 1).[12]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Since the Secretary's determination was put into effect when made, the three-year period has now passed, and both Matson and States are pursuing the matter at the administrative level.

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